In The

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1975

No. 75-1233

REA EXPRESS, INC., a Bankrupt,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

AIRLINES PARTICIPATING in AIR EXPRESS SERVICE, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN RETAIL FEDERATION, BROTHERHOOD of RAILWAY and AIRLINE CLERKS, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, DRUG and TOILET PREPARATION TRAFFIC CONFERENCE, and EASTERN INDUSTRIAL TRAFFIC LEAGUE, PET INDUSTRY PARTIES, EMERY AIR FREIGHT,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REA Express, Inc., a Bankrupt,

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Airlines Participating in Air Express Service, Air Freight Forwarders Association, American Retail Federation, Brotherhood of Railway and Airline Clerks, National Small Shipments Traffic Conference, Drug and Toilet Preparation Traffic Conference, and Eastern Industrial Traffic League, Pet Industry Parties, Emery Air Freight,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, REA Express, Inc., a bankrupt ("REA"), respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered on October 6, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 524 F.2d 54, and the related opinions of the Civil Aeronautics Board ("CAB"), appear in the appendix hereto. Page references to the appendix are cited with the suffix "a."

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 6, 1975. A timely petition for rehearing was denied on December 1, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). See *Morse v. United States*, 270 U.S. 151 (1926); *United States v. Healy*, 376 U.S. 75, 78 (1964).

QUESTIONS PRESENTED

1. Whether the decision to terminate Air Express could be made without a comparative hearing as to (a) the costs to be borne by the shipping public for alternative services, or (b) a new service proposed by the Civil Aeronautics Board but not yet developed.

2. Whether an environmental impact statement or evaluation was required.

3. Whether a public transportation service may be terminated without a supplemental hearing with respect to substantial changes in circumstances including the carrier's efforts to reorganize as a "debtor-in-possession" pursuant to Chapter XI of the Bankruptcy Act.

STATUTORY PROVISIONS INVOLVED

Section 102 of the Federal Aviation Act, 49 U.S.C. §1302:

In the exercise and performance of its powers and duties under this chapter, the Civil Aeronautics Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such a manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, *and foster sound economic conditions in,* such transportation, and to improve the relations between and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers *at reasonable charges,* without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics. [Emphasis added.]

Section 1002(e) of the Federal Aviation Act, 49 U.S.C. §1482(e):

In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors —

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers *at the lowest cost consistent with the furnishing of such service;*

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service. [Emphasis added.]

Section 1002(h) provides (49 U.S.C. §1482):

(h) Whenever, *after notice and hearing,* upon complaint or upon its own initiative, the Board is of the opinion that the divisions of joint rates, fares, or charges for air transportation are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the air carriers or foreign air carriers parties thereto, *the Board shall prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers. The Board may require the adjustment of divisions between such air carriers from the date of filing the complaint* or entry of order of investigation, or such other date subsequent thereto as the Board finds to be just, reasonable, and equitable. [Emphasis added.]

STATEMENT OF THE CASE

The transportation service known as "Air Express" was originated by REA's corporate predecessor in 1927, prior to the passage of the Civil Aeronautics Act of 1938. From 1927 until 1944, Air Express was the *only* service under which small shipments were hauled throughout the United States by common carriers by air. The air services were performed by the airlines and REA provided the ground services, including handling, transfers, routing, billing, and pickup and delivery, pursuant to a comprehensive agreement. REA was regarded as

an "indirect" air carrier. Beginning in 1944, however, the airlines began to publish their own tariffs and promote their own air freight businesses. Air freight forwarders developed thereafter.

Despite the competition by the new services, Air Express retained certain distinctive characteristics. It was the only "priority" service: the shipments were boarded first after baggage and mail, and generally on the first flight out of an airport, regardless of airline. It covered all points in the United States, knitting the various airlines together into an integrated service. It specialized in shipments that were small and difficult to handle. It utilized a single, simplified tariff for all shipments on all airlines, and to all locations. It provided unusual services, such as armed guard protection. And, for those small shipments it was best equipped to handle, it charged less than competing services.

Since 1929, REA had been owned by the railroads. In 1969, however, the railroads sold REA in an undercapitalized condition to a group put together by a new management which the railroads' voting trustees had recruited.

The Air Express arrangement had previously been dependent upon agreements negotiated between REA and a committee representing all of the airlines, subject to the approval of the CAB. The agreements had a five year term. When REA's new management came into the picture in 1969, the Air Express agreement was about to expire. The new management discovered that, with the relative growth of the airlines' separate air freight businesses, it had become increasingly difficult to negotiate a satisfactory Air Express agreement with the airlines as a whole. The new management further discovered that the

airlines, to encourage the growth of their separate businesses, were pricing air freight at substantially below cost.[1] The airlines received about twice as much per ton mile from their share of the Air Express divisions as they received from air freight. Although the airlines did not receive their fully allocated costs from either service, studies showed that they received a higher percentage of fully allocated costs from Air Express than they did from air freight. Finally, it appeared to REA's new management that the capital which the company so badly needed to remain in business would not be forthcoming as long as its ability to remain in Air Express was dependent upon the good will of the airlines, who after all were competitors, in negotiating an agreement.

Accordingly, on April 9, 1970, REA filed a petition and complaint with the CAB, asking that the following be established as the major principles to govern the Air Express arrangement:

> 1. The amount which REA pays the airlines should be fairly related to what other airline customers pay for air transportation.
>
> 2. REA should have the independent right, subject to Board approval, to develop and revise tariffs for Air Express service free from the

1. The substance to this contention is indicated by the subsequent finding of an Administrative Law Judge in a separate proceeding, the Domestic Air Freight Rate Investigation, Docket 22859. In that case, which is still pending, the Administrative Law Judge found that, based on 1972 data, air freight rates are unreasonably low and unjustly discriminatory, and that they should be increased on an average by 38.8%.

power of veto which the air carriers now have. The Air Express agreement and the tariff developed thereunder should not, as has been the case in the past, preclude Air Express customers from using the service for the long-haul air market and for a broader range of shipments.

3. The agreement should be permanent and provide for arbitration in the event that negotiations are unable to resolve disputes.

However, the CAB dismissed REA's petition and complaint, and bifurcated the issues raised therein into two separate proceedings: the Air Express Rates case and the Air Express Service case. REA promptly, but to no avail, objected to the severing of issues which were inextricably intertwined into two separate proceedings. The cases were assigned to different Administrative Law Judges who conducted separate hearings on separate timetables. And while the Board reached a final decision in the Air Express Service case, the Air Express Rates case, from which REA hoped to obtain the economic wherewithal for its survival, through the CAB's power (and statutory duty) to make retroactive determinations with respect to rate "divisions,"[2] remains undecided, consigned to some kind of administrative limbo called informal conferences. Meanwhile REA, unable to weather the CAB's terminal edict for Air Express, has been adjudicated a bankrupt. Thousands of employees have been thrown out of work, the interests of stockholders and thousands of creditors with millions of dollars in claims wiped out, and shippers throughout the country deprived of express services.

2. REA's expert witness calculated that the amount of overpayment to the airlines, based upon the yields which they were receiving from air freight, would have been in the approximate amount of one million dollars per month, retroactive to April 9, 1970.

Following oral argument in the court below, in an attempted settlement, REA and the airlines negotiated a new Air Express agreement which they felt addressed in a constructive way the Board's reservations about the prior arrangement. The court remanded the matter so that the CAB could consider the new agreement. Without further hearing or argument, however, the Board adhered to its former conclusion, ignoring REA's financial plight in the groundless belief that REA's operation as a freight forwarder would provide the best opportunity for its survival. By that time, REA had been compelled to petition for reorganization under Chapter XI of the Bankruptcy Act, and the Board never stopped to inquire whether REA then had the ways and means of transforming its Air Express business into air freight forwarding. REA requested a hearing but in vain.

The CAB's conclusion about the supposed desirability of REA's becoming a freight forwarder was thrown into stark irrationality by the Board's decision, in yet another docket, to require the airlines to develop another priority, interline service for small shipments. REA contended that Air Express should be kept in existence at least until the new service was developed so that comparative benefits and costs could be measured, to which the CAB responded with the contention that what it envisioned was not a replacement for Air Express. Whether the new service planned was or was not a replacement for Air Express — a contention difficult if not impossible to refute because of the impossibility of knowing precisely what the Board had in mind — was irrelevant, of course, to the question of why Air Express could not at least be retained in existence until the shippers — those who would actually use the service — could give voice to their preferences.

The CAB's death knell decision for Air Express had a predictable effect on REA's business; Air Express traffic dropped off markedly, a condition exacerbated by the decision of affirmance below on October 6, 1975, and on November 6, 1975, REA was adjudicated a total bankrupt.

Meanwhile, the Trustee, C. Orvis Sowerwine, Esq., has maintained certain of REA's profitable activities in operation, and seeks means whereby the company can be rehabilitated and restored to viability through a sale or other infusion of capital, in the hope that the value of REA's rights, of which he regards Air Express as an important part, can be preserved and realized upon as assets of the bankrupt estate. Funds potentially may be available through the Railroad Revitalization and Regulatory Reform Act of 1976, which has just been enacted. That Act defines "railroad" to include "a common carrier by railroad or express as defined in section 1(3) of the Interstate Commerce Act," a definition which REA, as the historical express company, would satisfy. *Congressional Record,* January 23, 1976, p. H218.

The Trustee regards the decision below as a substantial impediment to his hopes for rehabilitation and restoration. Accordingly, the Trustee has sought and obtained permission from Bankruptcy Judge John J. Galgay, in S.D.N.Y., Dkt. No. 75 B 251, to cause this petition for certiorari to be filed.

The Court of Appeals has granted a stay to prevent implementation of the CAB's decision, denied the CAB's request to dissolve the stay (3a), and has stayed the mandate pending determination and final disposition of a petition for certiorari (5a), on the basis of REA's showing of irreparable injury.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with statutory requirements and with decisions of other courts in failing to require findings as to the economic impact involved in the termination of a public service.

The Federal Aviation Act requires the CAB to consider "the need in the public interest of adequate and efficient transportation of . . . property by air carriers *at the lowest cost* consistent with the furnishing of such service." (49 U.S.C. §1482(e)(1) and (2).) (Emphasis added.)

Such a crucial consideration may not be ignored by the CAB in making a determination to terminate Air Express. As stated by this Court in *Atchison Topeka & Santa Fe Railway Co. v. Wichita Board of Trade,* 412 U.S. 800, 817 (1973): "Even giving the Commission's opinion the most sympathetic reading that we find possible, we cannot discover in it an expressed reason for permitting the railroads to reduce their services without showing that the rates they propose to maintain are reasonable rates for the service they intend to provide."

By bifurcating the issues raised by REA's petition and complaint filed in 1970, putting the issues in the Service case ahead of the economic issues raised in the Rates case procedurally, the Board deprived REA and the shipping public of important statutory rights to their substantial prejudice.

The decision below is at variance with the decisions of other circuits indicating that public interest determinations regarding

air services *must include* determination of the economic consequences. See *Alaska Airlines v. CAB*, 285 F.2d 672, 674 (D.C. Cir. 1960); *Nebraska Department of Aeronautics v. CAB*, 298 F.2d 286, 291 (8th Cir. 1962). By terminating a public service without first making an economic determination of the costs of the service, the CAB effectively eliminated any possibility of meaningful public participation in what it might have to pay for competitive services, a result out of harmony with the decision of the D.C. Circuit in *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). How could the shipping public make a choice as to which service it would prefer without knowing ultimately what the cost would be? Nor does the decision below offer a supportable response to that issue by referring to the level of rates reflected in the then current tariff (19a). As *Moss, supra*, shows, reference to tariff levels is not an adequate means of discharging the CAB's statutory economic requirements.

In the Rates case, REA contended that the amounts received by the airlines for their Air Express divisions were excessive by approximately one million dollars per month, compared with their yield from air freight. Had those divisions been adjusted as requested, REA would have been strengthened financially and the shipping public would have been the ultimate beneficiaries of reduced costs. The "hidden cost" of regulation, when the regulatory agencies, as here, fail to take such considerations into account, has been the subject of much recent discussion.

The kind of error which results from the absence of adequate analysis is exemplified by the general comment of the court below with respect to recent tariffs (19a-20a). Ignored is

the fact that the rates for *priority* service by individual airlines have been 130% of their general commodity rates for air freight, which do not include pickup and delivery. The comment also does not take into account the fact that in the still-pending Domestic Air Freight Rate Investigation, Docket 22859, the CAB's Administrative Law Judge found that air freight rates "are unjust and unreasonable" and that the prevailing freight rate structure is "unjustly discriminatory," leading to the conclusion that air freight rates should be increased by an average of 38.8%. Thus there has been a substantial escalation in what shippers have to pay for priority service for traffic formerly moving by Air Express, and further escalation apparently is in store.

The comparative cost analysis required is a responsibility imposed upon the administrative agency, see *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 92 (1957), and in this case, Air Express was terminated before that analysis ever reached the point of administrative finality, notwithstanding a finding by the Administrative Law Judge that "air freight forwarder service is not endowed with the favorable economics of a single ground agency concept, and consequently it cannot develop a rate structure for small shipments commensurate with air express." (JA624(a).)

If Congress has mandated that a factor be given consideration in the hearing process, it would make a mockery of the will of Congress, and due process as well, to permit the requirement to be side-stepped, as does the decision below, by stating that there is no "assurance" that the hearing would yield findings which would require a change in the Board's

decision (21a). Either the hearing process as such has integrity or it does not, and the condition that "assurance" be shown before even a hearing will be allowed implies a kind of *a priori* reasoning which (a) is the antithesis of due process, and (b) would effectively preclude judicial review. As stated in 2 Davis, *Administrative Law*, §15.14, p. 432:

> "The cardinal principle of fair hearing is . . . that parties should have the opportunity to meet in appropriate fashion all facts that influence the disposition of the case. . . . Nothing short of bringing the facts into the record, so that an unabridged opportunity is allowed for cross-examination and for presentation of rebuttal evidence, will suffice for the disputed adjudicative facts at the center of the controversy."

The requirement imposed by Congress that no significant administrative action can be taken in certain areas without findings on the *environmental* impact can not be obviated in service abandonment cases by a ritualistic recitation that there is no "assurance" that such findings would produce a different result, and we submit that Congress has spoken no less plainly in requiring findings on the *economic* impact in cases such as the one here involved.

Besides the overriding requirement that the CAB anchor its action on the considerations specified by Congress, the Administrative Procedure Act mandates findings on *each* of the statutory considerations to be supported by substantial evidence on the record, 5 U.S.C. §706(2)(E), and the courts in other

circuits have not hesitated to reverse CAB action when the Board has failed to state separate findings on all material issues presented. See *Trailways of New England, Inc. v. CAB*, 412 F.2d 926, 936 (1st Cir. 1969); *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 462 (D.C. Cir. 1967); *Northeast Airlines, Inc. v. CAB*, 331 F.2d 579, 588 (1st Cir. 1964); *Carey v. CAB*, 275 F.2d 518, 524 (1st Cir. 1953); *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

REA also consistently has requested that it be afforded an *Ashbacker*-type comparative hearing with regard to the new priority interline service which the CAB has ordered the airlines to develop. Only this Court can resolve the important issue of whether such a hearing is required in the circumstances of this case by *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945), and we respectfully request that it do so. In rejecting the applicability of *Ashbacker* to this case, the court below apparently has applied a different standard than the District of Columbia Circuit in *Kodiak Airways, Inc. v. CAB*, 447 F.2d 341 (D.C. Cir. 1971).

II. The CAB's failure to address itself to the requirements of the National Environmental Policy Act in the context of a decision to terminate Air Express gives rise to a public policy issue of sufficient importance to warrant review by this Court.

The CAB, regulating an industry with the greatest environmental impact per ton-mile of freight moved,[3] should be

3. Commoner, "Reporter at Large: Energy — III," *The New Yorker*, Feb. 16, 1976, p. 64, states:

(Cont'd)

required to explain to this Court why, six years after passage of the National Environmental Policy Act, it seeks the destruction of the service with the least adverse environmental impact without attempting to address itself to the statutory environmental requirements (42 U.S.C. §4332).

The fact that the administrative agencies have been laggards in satisfying the requirements of the National Environmental Policy Act has already provoked judicial comment with respect to the Interstate Commerce Commission. *Harlem Valley Transportation Association v. Stafford,* 500 F.2d 328, 331 (2d Cir. 1974).

The *Harlem Valley* case involved local rail abandonment proceedings; the termination of nationwide Air Express service has a much greater environmental effect and presents an *a fortiori* situation. The adverse consequences are no longer a matter of speculation. Following the cessation of Air Express services as a result of REA's adjudication in bankruptcy, Federal Express, an air taxi cargo carrier seeking exemption authority to

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> "Transportation dominates the energy picture. It is the largest single end use of energy, consuming twenty-five per cent of the total American energy budget."
> "Air pollution from transportation can be judged by the amount of fuel burned. . . ." (p. 69).
> "In the last few years, energy productivities have been computed for all the major modes of intercity transportation. Railroads . . . have the highest energy productivity for general freight: 1,300 ton-miles per million B.T.U.s, compared with 360 for intercity trucks and 20 for airlines." (p. 68).

use larger aircraft, filed a petition for reconsideration with the CAB dated January 28, 1976 making the following statement:

> "The gap created by the final collapse of REA's long-declining Air Express service has had a particularly significant impact on Federal Express' traffic because so few other air freight carriers offer a system having a geographic scope comparable to that of REA, particularly at low density cities." (pp. 11-12).

The bottom line in environmental terms is the admission that, because of the large amount added to its nightly volume by the cessation of Air Express, Federal has had "to add needed capacity on a grossly inefficient basis — greatly increasing its cost, wasting scarce fuel, and jeopardizing its service reliability." (p. 3).

Nor does the simplistic solution proposed by Federal — letting it use larger aircraft — address itself to the underlying problem.

Air Express is the least costly and most efficient method of moving small shipments by air because of the shared use of equipment and facilities. For the same reason, the environmental consequences are less. As the Administrative Law Judge found, 80% of Air Express shipments were carried in the cargo space of combination aircraft, space which in recent years, with the advent of wide bodied aircraft, has been greatly underutilized (JA626(a)). As these aircraft carry passengers also, they would be operating in any event, and the environmental impact of Air

Express carried in that way therefore was minimal. In contrast, only 42% of air freight forwarder traffic moves on combination aircraft; the rest moves on specialized all-cargo aircraft, a condition of imbalance which the ALJ found would be exacerbated by the shift of Air Express to forwarder operations. Noise is a further environmental factor because of the emphasis placed by forwarders on all-cargo night operations, and the potential effect on day/night operational patterns.

The lack of an environmental impact statement was raised in but ignored by the court below (REA Br. 45, fn.). The point was not raised directly in the administrative hearing because of the following factors: (a) REA was not seeking termination of Air Express but its continuation, (b) testimony regarding the greater efficiency of Air Express was introduced, (c) the proponents of the termination of Air Express, if anyone, had the primary responsibility for justifying the environmental consequences of the change which they sought, (d) the *Harlem Valley* and other cases make it clear that the burden of assuring compliance with the National Environmental Policy Act falls upon the agency itself, (e) at the time of the hearing, the CAB's definitive environmental regulations [promulgated in September 1975] were still several years from being written, and (f) the Administrative Law Judge held that Air Express should be *continued*, in part because of its greater efficiency of operation, so at the time of review by the CAB, REA had no basis for objecting to the lack of an environmental assessment nor was it aware of the substantial nature of point until later, when the great expansion in operations by Federal Express took place.

When Federal Express applied for an exemption to allow it to operate larger aircraft, REA opposed the application and moved to have the application consolidated with the Air Express Service case and the CAB's priority service docket so that a comparative hearing could be held on environmental and other aspects. We also pointed out that Federal's operation was inherently wasteful, whether it used large or small aircraft, because of its specialized nature and the circuity involved, causing unnecessary air and noise pollution, and that

> "The increase in the use of special purpose aircraft, while the regulated air carriers are operating combination aircraft with only a fraction of their belly capacity filled with cargo would constitute a major federal action having a substantial impact upon the environment." *Request for Hearing and Motion*, Oct. 14, 1975, p. 9.

The CAB ignored the environmental aspect and dismissed REA's motion as moot on the ground that it had denied the application for other reasons. *CAB Order 75-12-38*, Dec. 8, 1975. However, the environmental point was *not* moot; it was intensified as a result of the cessation of Air Express and continued operations by Federal, as demonstrated by the statements quoted above from Federal's petition for reconsideration.

The CAB may contend that REA could raise the same issue in the District Court by bringing an unusual action in the nature of mandamus, as in *Harlem Valley, supra*. But neither REA nor

the judicial system has the time nor resources to afford that kind of redundancy. The CAB's undeniable neglect in addressing air cargo environmental concerns generally and in the context of this proceeding particularly, we submit is a subject well worthy of this Court's attention. Cf. *Stern & Gressman, Supreme Court Practice* §11.1 (4th ed. 1969).

III. The decision below raises significant and recurring problems concerning the relationship between the exercise of jurisdiction by one administrative agency in such a way as to preclude or frustrate the jurisdiction of other administrative agencies, or the Bankruptcy Court.

Air Express accounted for approximately 30% of REA's total revenues. The rest was derived from surface express, operated under certificates of public convenience and necessity issued by the Interstate Commerce Commission and various state agencies. By placing the continuation of REA's unique surface express operations in extreme jeopardy, the CAB has brought havoc to a sector of the public interest with respect to which it has no jurisdiction.

For over one hundred years, express operations have been characterized by their inter-modal nature. This was so significant a factor in REA's situation that a tripartite group with representatives of the CAB, the Federal Maritime Commission and the Interstate Commerce Commission worked together to produce a comprehensive *Study of REA Express (Staff Study)* in 1965. This Study pointed out that regulation of REA by the different agencies "... is by virtue of various statutory provisions which leave unanswered some questions of lines of demarcation among the several agencies, and also of coverage of

all REA activities," and that "the impact of competition goes beyond the areas in which a single agency may exercise its authority." (p. 3).

In its annual report for fiscal year 1974 the ICC expressed concern about the effect of the CAB's ruling regarding Air Express (p. 54): "A December [1973] ruling by the Civil Aeronautics Board affecting the operational status of REA Express, Inc. (REA) may have serious bearing on the company's capability to maintain a financially viable posture." It adds (p. 55): "Whether REA has the capability to continue as a viable transporation entity in light of the CAB order remains to be seen." In addition, the ICC's annual report states *(ibid.)*:

> "In light of these circumstances and the special status which REA enjoys under the Interstate Commerce Act in the conduct of its express service, a joint hearing of the Senate Subcommittees on Air and Surface Transportation was held in executive session on June 10, 1974, to investigate the situation involving REA. The Commission presented testimony at these hearings concerning the current operations of REA. The conclusions of the hearing have not as yet been made public."

And the Senate Committee on Commerce in its Report entitled "Federal Assistance For Carriers of Express" (S. Rep. No. 92-1158, September 15, 1972) stated (p. 3):

"REA has long provided service for such unique and sometimes undesirable and troublesome items as corpses, blood, valuables, live animals, ornamental crops, fresh fruits and vegetables, shoes, drugs, medicines, coffee, typewriters, furniture, flagpoles and the occasional household items, steamer truck or camp baggage. Generally speaking, REA is a carrier of small shipments. Reportedly half its shipments weigh less than 50 pounds, almost three of every four are under 100 pounds and only 1/20 of REA's traffic is shipments weighing 1,000 pounds or more. Currently the company employs some 16,000 employees."

* * *

"The Committee is concerned about the possible loss of REA Express service which the Committee deems to be important even though other companies in some instances may provide similar service. The need for small shipments service is of such that the loss of a significant competitor for small shipments traffic could conceivably reduce substantially the quality of service for small parcels. Indicative of potential difficulties are the problems which reportedly face the pet industry, many breeders and dealers (of dogs and birds especially). Some are considering institution of proprietary service, and others the formation of a shipper's association.

Many others, however, are too small to engage in such operations. Their potential problems are most serious."

As noted in the Statement of the Case, *supra*, Congress has just enacted the Railroad Revitalization and Regulatory Reform Act of 1976, containing provisions for financial assistance for express companies like REA. The trustee is very desirous of finding a successor who will rehabilitate the Express Company. Thus the CAB's decision to terminate Air Express places a serious obstacle in the path of rehabilitation, and raises important public policy considerations which do not lie within the jurisdiction of the CAB exclusively.

Approximately two-thirds of REA's revenues derive from surface express operations regulated by the Interstate Commerce Commission and the regulatory agencies of the various states throughout the United States. To permit an agency which has an impact upon substantially less than half of the total of the operation conducted in the public interest to have a veto power over the possibility of rehabilitating the Express Company would be to undercut the regulatory authorities and responsibilities of the other agencies affected in a way which Congress could not have intended.

The court below said it saw no "need" for the CAB to postpone its decision until it has finally determined the issues in the Rates case or put into effect a new high-priority service (20a-21a). We suggest that the burden should be just the opposite: in view of the important public policy considerations pointed out above, what was the Board's "need" to implement its decision

before those additional events take place? A good and faithful servant of almost fifty years standing is entitled to no less consideration.

Further, there is a substantial question whether REA was accorded procedural and substantive due process by the CAB as it struggled for survival. On February 18, 1975, REA was forced to seek reorganization under Chapter XI of the Bankruptcy Act. This presented an opportunity to submit new operational plans which would reduce costs and give the company an opportunity to straighten out its financial affairs. The creditors were cooperative. However, the existing labor agreements constituted a serious impediment to success, and REA succeeded in an action to have them rejected as onerous and burdensome by the Bankruptcy Court. In *Brotherhood v. REA Express, Inc.*, 523 F.2d 164, 170 (2d Cir. Aug. 27, 1975), *cert. denied*, —— U.S. ——, the court said:

> "When REA, after going into Chapter XI proceedings, was authorized to operate as a debtor-in-possession, it acted as a new juridical entity."

It was treated as a "new employer" which, the court emphasized, "...must be granted certain prerogatives at the outset in making changes in the method of operation, business structure and labor arrangements of a venture. Otherwise, the free flow of capital and efforts to revive or expand a weak enterprise might be frustrated." (*Ibid.*)

No single factor led to a greater degree of frustration of the efforts to revive or expand REA as a Chapter XI debtor-in-possession than the CAB's inflexibility. When so extreme an action as the rejection of collective bargaining agreements as onerous and burdensome may be justified to satisfy the objectives of the Bankruptcy Act, do not those same objectives require the CAB at least to *consider* the possibility of some accommodation? The Federal Aviation Act itself specifies that the CAB *shall* consider "The regulation of air transportation in such a manner as to . . . foster sound economic conditions in, such transportation . . . ." (49 U.S.C. §1302(b).)

Despite the extremity of REA's situation, and its status as a new "juridical entity," the CAB was unwilling even to accede to its request for a hearing following the filing of its petition for reorganization under Chapter XI. In its request for such a hearing, REA stated that, "Fairness alone would dictate that, if the Board is unwilling to approve the new Air Express agreement in its present form, it should indicate what terms and conditions it would approve so the continuity of employment could be assured." Hence, REA's request was that the CAB should "either approve the new Air Express agreement or order a hearing in which an evidentiary record is made concerning the new circumstances involving REA and Air Express."[4]

At that stage of its existence REA had long passed the point of ideology regarding Air Express, and was simply and humbly seeking the opportunity to survive. The CAB turned a deaf ear,

4. *Petition for Reconsideration*, April 29, 1975, pp. 13-14. The Board denied this request in its order dated May 23, 1975. REA did not file a separate petition to review as the Second Circuit had retained jurisdiction over the matter.

denied a hearing on what the possibilities might be, and the court below converted CAB's non-consideration of the subject into what is merely a speculation, unsupported by record evidence, namely that ". . . the Board, apparently recognizing employee welfare as a factor to be considered in deciding what course would be in the public interest . . . granted air freight forwarder authority to REA specifically on the ground that its operation as a freight forwarder would provide the best opportunity to benefit its employees." (21a-22a).

We respectfully disagree with that conclusion even based upon the record as it was presented in a hearing which ended in 1971.[5] But as applied to a situation which existed in 1975, following substantial and profound changes of circumstances, not made the subject of a hearing before the Board, we submit that the application of a false premise, namely that air freight forwarding will be of benefit, when in fact the effect of such a decision would be to wipe out the company, its jobs, and the public services it performs, represents a denial of due process in a very basic way. REA, its management, its employees, its creditors, and its customers, all of whom had the greatest and most direct interest in the survival of the company and its services, and with no motive whatsoever for seeing the wrong choice made, all believed that the forced conversion of the company into air freight forwarding would be not "REA's best opportunity," but a disaster.

As shown in an affidavit submitted by REA, such a conversion would involve substantial changes in operations, in

5. The decision below errs in indicating that dual authority to provide both Air Express and air freight forwarding service was a primary objective of REA. Dual authority was requested *only as an alternative position if other improvements in Air Express — primarily reduction of costs and rates — were not made.*

facilities, in marketing approach, in customers, in employee practices and training requirements, which REA was unable to make. Thus, in the changed circumstances, the decision to terminate Air Express became a corporate death sentence.

". . . some kind of hearing is required at some time before a person is finally deprived of his property interests." *Wolff v. McDonnell*, 418 U.S. 539, 557-8 (1974). We submit that such a "hearing" must take place with respect to the factual situation as it exists in some proximate time relationship to the period in which the deprival of property interests occurs. In the approximately four years following the hearing in the Air Express Service Investigation, there have been significant developments involving REA, other carriers, and in the industry itself. There is a fundamental question of how "stale" a record may be and still justify "substantial evidence" reliance thereon within the context of the constitutional guarantee of due process.

Even the termination of welfare benefits without a hearing has been held to infringe upon due process, see *Goldberg v. Kelly*, 397 U.S. 254 (1970), and the termination of a pioneering public service should be given no less consideration. In a constitutional scale of values, "there is a human difference between losing what one has and not getting what one wants," a distinction which "is valid in economic regulation," also, because "capital has been expended, investor expectations have been aroused, and people have been employed." See Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1975), and discussion therein.

Finally, "The required degree of procedural safeguards varies directly with the importance of the private interest

affected . . ." (article cited *supra,* at 1278), and the importance and magnitude of the public and private interests affected in this litigation are substantially greater than those in many of the cases in which this Court has taken for review to consider the applicability of the due process requirements. (*Ibid.*)

CONCLUSION

So that the decision below will not constitute a further obstacle to hopes and efforts for the rehabilitation and restoration of express services for the shipping public, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

Arthur M. Wisehart
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New York, New York 10017
Counsel for Petitioner

Supreme Court, U. S.
FILED
MAR 1 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-1233

REA EXPRESS, INC., a Bankrupt,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

AIRLINES PARTICIPATING in AIR EXPRESS SERVICE, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN RETAIL FEDERATION, BROTHERHOOD of RAILWAY and AIRLINE CLERKS, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, DRUG and TOILET PREPARATION TRAFFIC CONFERENCE, and EASTERN INDUSTRIAL TRAFFIC LEAGUE, PET INDUSTRY PARTIES, EMERY AIR FREIGHT,

Intervenors.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of December, one thousand nine hundred and seventy-five.

Docket No. 74-1611

REA EXPRESS, INC.,

Petitioner,

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al.,

Intervenors,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

AIR FREIGHT FORWARDERS ASSOCIATION, et al.,

Intervenors.

Order Denying Petition for Rehearing

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

ORDER DENYING MOTION TO DISSOLVE THE STAY ORDER

74-1611
B 15

UNITED STATES COURT OF APPEALS

Second Circuit

Filed November 24, 1975
A. Daniel Fusaro, Clerk

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 24th day of November, one thousand nine hundred and 75

REA Express, Incorporated,

Petitioner,

v.

Civil Aeronautics Board,

Respondent.

Airlines Participating in Air Express Service, Air Freight Forwarders Association, American Retail Federation, Brotherhood of Railway and Airline Clerks, National Small

Order Denying Motion to Dissolve the Stay Order

Shipments Traffic Conference, Drug and Toilet Preparation Traffic Conference and Eastern Industrial Traffic League, Pet Industry Parties, Emery Air Freight,

Intervenors.

Dec. 3, 1975

It is hereby ordered that the motion made herein by counsel for the respondent dated November 11, 1975 to dissolve the stay order filed July 16, 1974 and continued by order filed October 10, 1975 be and it hereby is denied without prejudice to renewal upon a showing that operations will not be resumed.

s/ J. Joseph Smith
J. Joseph Smith

s/ Paul R. Hays
Paul R. Hays

s/ Walter R. Mansfield
Walter R. Mansfield
Circuit Judges

STAY OF MANDATE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Oct. 15, 1975

REA EXPRESS, INC.,

Petitioner,

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al.,

Intervenors,

-against-

CIVIL AERONAUTICS BOARD,

Respondent,

AIR FREIGHT FORWARDERS ASSOCIATION, et al.,

Intervenors.

No. 74-1611

Counsel for petitioner ("REA") having advised this Court that REA intends to petition for rehearing of this Court's

Stay of Mandate

decision of October 6, 1975 and, if that is denied, to petition for a writ of certiorari to the United States Supreme Court, in a timely manner, and upon consideration of the showing of irreparable injury made by the affidavits submitted on behalf of petitioner and the stay previously entered by this Court on July 16, 1974,

IT IS ORDERED that the mandate herein be and hereby is stayed pending determination of petitioner's petition for rehearing and, if that is denied, petition for a writ of certiorari. If the petition for a writ of certiorari is granted, the stay shall continue until final disposition by the Supreme Court in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Dated: New York, New York
October 10, 1975

s/ J. Joseph Smith
J. Joseph Smith

s/ Paul R. Hays
Paul R. Hays

s/ Walter R. Mansfield
Walter R. Mansfield
Circuit Judges

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 380—September Term, 1974.

(Argued: November 21, 1974

Remanded for Reconsideration:
December 23, 1974

Decided after Remand and
Reconsideration: October 6, 1975.)

Docket No. 74-1611

REA EXPRESS, INC.,
Petitioner,

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al.,
Intervenors,

—against—

CIVIL AERONAUTICS BOARD,
Respondent,

AIR FREIGHT FORWARDERS ASSOCIATION, et al.,
Intervenors.

Before:

SMITH, HAYS and MANSFIELD,
Circuit Judges.

Petition for review of orders of the Civil Aeronautics Board terminating the authority of REA Express, Inc. as an indirect air carrier to provide "air express" service,

but authorizing it to act as an air freight forwarder, and denying its application for independent rate-making authority.

The orders are affirmed.

BERT REIN, Esq., Washington, D.C. (Kirkland, Ellis & Rowe, Washington, D.C., Arthur M. Wisehart, Esq., John J. C. Martin, Esq., Peter G. Wolfe, Esq., New York, N.Y., Anderson, Russell, Kill & Olick, P.C., New York, N.Y., of counsel), *for Petitioner REA Express, Inc.*

PETER R. STEENLAND, JR., Attorney, Civil Aeronautics Board, Washington, D.C. (Thomas J. Heye, General Counsel, C.A.B., O. D. Ozment, Deputy General Counsel, Glen M. Bendixsen, Associate General Counsel, Robert L. Toomey, Attorney, C.A.B., Washington, D.C., Thomas E. Kauper, Assistant Attorney General, Howard E. Shapiro, Attorney, Department of Justice, Washington, D.C., of counsel), *for Respondent Civil Aeronautics Board.*

LOUIS P. HAFFER, Esq., Washington, D.C. (Robert N. Meiser, Esq., Haffer & Meiser, Washington, D.C., of counsel), *for Intervenors Air Freight Forwarders Association.*

SOLOMON I. HIRSCH, Esq., Rosemont, Ill. (William J. Donlon, Esq., Brotherhood of Railway, Airline & Steamship Clerks, Rosemont, Ill., Reilly, Fleming & Reilly, New York, N.Y., Highsaw & Mahoney, Washington, D.C., of counsel), *for Intervenor Brotherhood of Railway, Airline and Steamship Clerks.*

JERRY R. RYAN, Esq., Washington, D.C. (Reavis, Pogue, Neal & Rose, Washington, D.C., of counsel), *for Emery Air Freight Corporation.*

EUGENE WALLMAN, Esq., New York, N.Y. (N. Marshall Meyers, Esq., Washington, D.C., of counsel), *for Intervenors Pet Industry Joint Advisory Council, Association of Animal and Fish Distributors, Inc., National Pet Dealers and Breeders Assn., Inc., Pet Producers of America, Inc., Florida Tropical Fish and Farm Assn., Inc., Safari Animal Imports, Inc., Gators of Miami, Inc., A-1 Animal Ranch, Inc.*

WILLIAM KEENAN, Esq., New York, N.Y. (Martin S. Snitow, Esq., Arsham & Keenan, New York, N.Y., of counsel), *for Intervenors National Small Shipments Traffic Conference, Inc., Drug and Toilet Preparations Traffic Conference and Eastern Industrial League, Inc.*

RICHARD A. HYDE, Director Legal Proceedings, United Air Lines, Inc., Chicago, Ill., *for United Air Lines, Inc., one of Airlines participating in Air Express Service.*

RUSSELL S. BERNHARD, Esq., Washington, D.C. (Macleay, Lynch, Bernhard & Gregg, Washington, D.C., William C. Burt, Esq., Koteen & Burt, Washington, D.C., of counsel), *for*

Airlines participating in Air Express Service.

MANSFIELD, *Circuit Judge:*

REA Express, Inc. ("REA") has petitioned for review of several orders of the Civil Aeronautics Board ("Board") affecting REA's operations, the most important of which are orders (1) terminating REA's authority as an indirect air carrier to provide "air express" service under an agreement with some 33 United States airlines[1] but authorizing REA to act as an air freight forwarder in lieu of providing "air express" service, and (2) denying REA's application for authority independently to set rates for air express services, free from any veto power by the airlines. The orders had been entered in the Board's *Express Service Investigation* (Dkt. 22388) which had been instituted in 1970 following REA's filing of a complaint with the Board seeking independent rate-making authority and aid in REA's stalemated negotiations with the air carriers.[2] By order dated July 16, 1974, we stayed the Board's orders pending our review.

1 The authority was derived from the Board's 1941 decision to the effect that REA, as an indirect air carrier, was granted a temporary exemption pursuant to §1(2) of the Federal Aviation Act of 1938 (which later became §101(3) of the Act of 1958, 49 U.S.C. §1301(3)). See *Railway Express Agency (Grandfather Certificate)*, 2 C.A.B. 531, 541 (1941). In 1943 the Board approved the agreements between REA and the air carriers subject to certain modifications. See *Railway Express Agreements*, 4 C.A.B. 157 (1943). The temporary exemption was thereafter extended from time to time and renewal agreements were approved at five-year intervals. The last air express agreement so approved was entered into in 1964 and expired in 1969.

2 A 1970 agreement, which was subject to Board approval of a new higher tariff, collapsed when the Board suspended the tariff and instituted its proceeding entitled "Investigation of Air Service Rates" (Docket 22387).

Upon the argument of this appeal on November 21, 1974, we were informed that on that very date an agreement had been reached between REA and all but six or seven of the air carriers, which would meet most of the Board's objections to the continuation of the air express service as operated jointly by REA and the air carriers. Since friction between REA and the air carriers and their inability to reach a new agreement had been a factor influencing the Board's decision to terminate REA's air express service, we remanded the case to the Board for reconsideration in the light of this new development, retaining jurisdiction over the appeal which had been briefed and argued. By orders dated April 9, 1975, and May 23, 1975, the Board disapproved the latest REA-airlines agreement as not in the public interest and reaffirmed its earlier decision. Thereupon the parties filed additional memoranda directed toward the Board's decision after remand. We affirm the Board's orders under review.

"Air express," the oldest method of shipping air cargo, is a door-to-door priority air cargo service offered only by REA which, pursuant to its agreements with United States air carriers, functions as the single agency responsible for all ground services required to make the shipment, including pick-up, terminal handling, interline transfers, and delivery to the consignee. In addition to single carrier responsibility, it features single documentation, expedited priority air service, a simplified rate structure, and wide geographical coverage throughout the United States, particularly in small cities which do not generate enough business to support a larger scale air cargo service. Under its arrangements with the airlines, REA issues a single uniform express bill of lading and bills the customer at special air express tariffs which cover door-to-door charges at simplified rates based essentially on commodity and dis-

tance and which are shared by REA and the air carriers. The airlines dispatch the customer's shipment on the first available flight to its destination. For the purpose of handling this business REA maintains offices at some 69 airports. At the remaining 500 airports or so REA's ground services are provided by airline personnel.

For many years REA's air express service represented the only method of shipping merchandise by air carrier. Following the Board's decision in *Railway Express Agreements*, 4 C.A.B. 157 (1943), however, the air carriers began offering to the public airport-to-airport "air freight" services to be rendered by the carriers on their own at tariffs posted by the airlines. The shippers and consignees were required, respectively, to deliver and pick up their shipments at the airports involved. In 1948 a third form of air cargo service known as "Air Freight Forwarder" service was authorized by the Board, see *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948), whereby indirect carriers known as air freight forwarders were authorized to pick up freight from shippers at a given point, assemble and consolidate the shipments for transfer by direct air carrier and, upon arrival of the consolidated shipment at its designation, perform break-bulk and distribution functions.

The introduction of competition by direct carrier air freight service and by forwarders resulted in air express eventually developing primarily into a door-to-door small package service, with the average shipment weighing only 27 pounds and moving approximately 500 miles. Air freight forwarders attracted larger size shipments (80-pound average) while the airlines' own air freight service averaged 300 pounds per shipment. Unlike REA the forwarders for the most part could not provide single carrier responsibility and single documentation except for

shipments between pick-up and delivery zones of airports covered by their tariffs.[3] As a result most forwarders have tariffs based on the point-to-point tariffs of the direct air carriers with only a few publishing door-to-door tariffs.

Air express service is available at every airport city covered by scheduled air carriers. Although REA maintained at one time 3,000 office or agency locations performing its operations throughout the country, this number has been considerably reduced in recent years. However, the number of cities and towns covered by its services far exceed the facilities offered by forwarders, which generally maintain no facilities at all at the smaller airport cities except for some "destination" agencies which do not originate shipments.

By the late 1960's the amount of forwarder business was increasing enormously (168% during the period 1966-70) in contrast to REA's air express business, which was virtually at a standstill (3% increase during 1966-70). REA, furthermore, was experiencing acute financial adversity, resulting in substantial annual losses from 1966 to 1974, which led to its institution of Chapter XI bankruptcy proceedings in 1975. The cooperation between REA and the air carriers, which was essential to the successful operation of air express service, faltered. As the airlines increased their own competing air cargo freight service, their negotiations with REA stalemated and REA, because of its financial plight, had difficulty making payments due the airlines.

In the *Express Service Investigation* REA argued that in order to survive it needed (1) independent rate-making

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3 Emery Air Freight Corp., however, has surface freight authority from the ICC which allows it to provide pick-up and delivery service anywhere in the United States, and thus to provide single carrier responsibility and documentation to the same extent as REA.

authority, (2) dual authority to provide both air express and air freight forwarding service, and (3) permanent status as the exclusive air express carrier. Fundamental to REA's position was the assumption that air express provides a priority service over a larger geographical area and at a lower cost to the public than air carriers or forwarders and that continuance of air express was therefore in the public interest. However, while the airlines conceded in the *Express Service Investigation* that there was a public need for the existing form of air express service at least with respect to certain types of small shipments (e.g., "life or death" commodities, highly perishable products, animals), the forwarders urged abolition of air express service on the ground that, in view of the increasingly comparable service being provided by them and by the carriers, air express was no longer needed and had the adverse effect of stifling competition and the growth of these other services. The forwarders argued that they could match the service in terms of speed, commodity and geographical coverage. Various shippers, on the other hand, who preferred or were currently dependent on air express service, urged its continuation.

In an initial decision dated May 4, 1972, the Administrative Law Judge ("ALJ") found, among other things, (1) that air express service as represented by the partnership between airlines and REA as a single ground agency had a utility distinguishable from the other air freight services and was in the public interest, (2) that as long as REA engaged in air express service it would be contrary to the public interest to grant it forwarder status, and (3) that the establishment by REA of a special tariff for air express tariff was unnecessary. Based upon limited elapsed time surveys made by the parties, the ALJ found that, while the bulk of shipments handled by all three services (air

express, air freight, and forwarder) were delivered within 48 hours of origination, REA handled the highest percentage of those shipments delivered within 24 hours, with the possible exception of Emery. He further found that REA's priority air express offered the shipper an advantage during holiday seasons and peak traffic occasions, assuring shipment by the first available flight regardless of the time of origination. He further concluded that because of REA's wide commodity coverage and simplified single carrier responsibility and single documentation REA was able to handle small shipments at a lower cost than other services and was able to ship small commodities, such as animals and high security shipments, between points not served by the other services.

The ALJ concluded that if air express should be abolished many shippers would be faced with substantially higher costs for small shipments and small airport cities would be left with the airport-to-airport service of direct air carriers since there would be no air forwarder representation at these points. With respect to REA's request for dual air express-forwarder rights the ALJ reasoned that such authority was not in the public interest because it would give REA an unfair advantage over competing services. Thus in effect the ALJ recommended maintenance of the status quo.

Upon appeal the Board affirmed the ALJ's finding that it would not be in the public interest to grant REA dual air express-forwarder rights or independent rate-making power. These powers, the Board concluded, would enable REA to dominate the indirect air carrier industry, would have an adverse impact on the development of the air freight business, would cause customer confusion, would divert REA's energies from the small shipment-small community service and would lead air carriers to refuse to

enter into agreements with REA for carriage of cargo originated by REA. Independent rate-making power would, because of lack of cost data and the conflicting interests of REA and the airlines, lead to insoluble regulatory problems and irreconcilable differences between REA and the airlines. It also appeared likely to the Board that REA could through cross-subsidization burden certain types of shipment with costs attributable to others, thus gaining an unfair advantage over other air freight services, enabling it to obtain some of their longer-haul heavier shipments.

The Board further concluded that air express service was no longer in the public interest. Based on its analysis of the record it found that as the nation's general air freight industry had grown many of air express' historical advantages had "withered away." REA's air express business, in contrast to that of the airlines and forwarders, had not increased substantially. Its service was no longer unique since it was not faster than that of the forwarders, which had developed operational techniques comparable and in some instances superior to express service, as reflected by elapsed time surveys. The Board found that with the increase in air cargo space air express' priority rarely had any impact. Although a small percentage of shippers found air express' highly expedited service useful, the Board decided that this need could better be handled by requiring the air carriers to develop a new highly expedited priority service under special tariffs that would be available to all shippers demanding priority service rather than to permit it to be handled solely by REA as a coordinating ground agent.

Conceding that in the past REA had provided broader geographical coverage than the other air freight services, the Board expressed the belief that with the demise of air

express the larger forwarders would probably expand their existing coverage, which had already been increased to include virtually every carrier airport city. Furthermore, in view of REA's worsening financial condition the Board believed that REA would be forced to pull out of many small communities and to consolidate its services. With respect to commodity coverage the Board similarly concluded that, in view of the very few items presently handled solely by REA and the likelihood that other air freight services would expand their coverage to handle those commodities, the termination of air express would neither preclude any commodity from moving by air nor result in any community being unserved in the handling of such merchandise. Furthermore, without an economically viable REA and an agreement between it and the airlines, which provided the essential air transportation and at 85% of the airports the necessary ground services, air express service simply would not be able to function.

Having concluded that air express service, which had been handled exclusively by REA, must be terminated, the Board decided that it would nevertheless be in the public interest to grant authority to REA to function as an air freight forwarder, since this would enable it to handle the types of traffic with which it could deal most effectively and to operate without dependency on an agreement with the airlines. In sum, the Board (1) disapproved the REA-airlines agreements for air express service on the ground that such service was no longer in the public interest and accordingly denied REA's requests for dual air express-air freight forwarder authority and for independent rate-making power, (2) terminated REA's temporary authority as the exclusive indirect air carrier for air express, (3) authorized REA to operate nationwide as an air freight forwarder, and (4) directed the air carriers to introduce

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a new high-priority cargo service designed for shipments requiring highly expedited carriage and delivery.

DISCUSSION

REA's first contention is that in terminating air express service the Board violated the mandates of the Federal Aviation Act of 1958, 49 U.S.C. §§1301(3), 1302 and 1382(b), and of the Administrative Procedure Act, 5 U.S.C. §§701-706, by limiting itself to consideration of selected adversarial contentions and by failing to apply "public interest" criteria specified by Congress as the standard in deciding the issues before the Board. See *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 394-97 (1974). The effect, REA argues, was to "execute" it as a carrier and to harm the shipper interests by distorting the geographic and commodity coverage that would be available to them in the future and by foisting a more expensive forwarder service upon the public. We disagree.

The Board's decision, supplemented by its order on remand, discloses that it observed its responsibilities to REA and to the public, making its "public interest" determinations only after weighing and balancing the essential relevant factors which it was obligated to consider: the shippers' needs, the cargo offered for transport, the nature and extent of the markets and commodities affected, and the characteristics of the three competing services.

The record reveals substantial evidence supporting the Board's findings to the effect that with rare exceptions REA's service is not faster than that of the other types of service, that its priority treatment has become almost entirely meaningless, that its broad geographic coverage is no longer unique in comparison to that of competing forwarder services and that its exclusivity in the transport of certain commodities has disappeared. Being supported

by substantial evidence, these findings must stand. Federal Aviation Act of 1958, §1006(e), 49 U.S.C. §1486(e); Administrative Procedure Act, §10(e), 5 U.S.C. §706(e); *Universal Camera Corporation* v. *NLRB*, 340 U.S. 474, 488 (1950).

Although the Board, in carrying out its duty to determine whether a particular form of service will promote "adequate, economical and efficient service by air carriers at reasonable charges," 49 U.S.C. §1302(c), may be obligated, as REA argued, to consider the "comparative economics" of the various types of air service offered, we do not believe that this requires the Board to conduct an investigation in depth into the costs of each type of service of the kind that might be required for a rate determination under 49 U.S.C. §1482(e), or for a determination as to whether an entirely different kind of service should be initiated, see, e.g., *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957). Here the Board, acknowledging that REA offered lower rates to small-package shippers for some commodities, concluded that the public need for such service would best be served in the future by opening up air express markets to all indirect air carriers and relying on competitive forces to provide a dependable air freight service for all classes of commodities. We cannot say that its conclusions are unreasonable. Indeed, the Board's conclusion was reinforced by REA's filing in November 1974 of a new tariff (Appendix B to Board's Answering Memorandum dated June 16, 1975, following its adherence upon remand to its earlier decision) raising its rates on many commodities, thus eliminating much of the advantage claimed on the basis of lower rates. Although we are advised that it has since filed still another tariff lowering the rates on some commodities, the interim higher-rate proposal raises questions as to its ability to operate

an air express service economically at present rates and as to whether the rates would not be revised upward if REA should continue to operate air express as a monopoly.

We agree with REA that if the public interest mandated the continuance of the present air express system the Board could not properly confuse that issue with the problems inherent in REA's precarious financial condition. On the other hand, in deciding whether the public interest would be served, the Board was not precluded from considering, among other factors, REA's dire straits, at least in the absence of a showing that some other carrier might conceivably be willing and able to provide air express service. Here, unlike the situation in *Northeast Airlines Inc.* v. *CAB*, 331 F.2d 579 (1st Cir. 1964), upon which REA so heavily relies, no carrier other than REA would provide air express service. Indeed, REA, operating under the umbrella of a CAB-granted monopoly, is the only carrier that has ever provided that service. In any event, although the Board took REA's uncertain future into consideration, its decision was based firmly on the ground that the public need for air express service had all but vanished with the advent of substitute services.

Having concluded that the Board's decision to terminate air express service must be upheld, we see no purpose to be served in reviewing the Board's denial of REA's application for independent rate-making authority and dual air express, freight forwarder status except to note that the Board's conclusion that the grant of such authority would not be in the public interest appears, for the reasons stated by the Board, to be reasonably grounded and well within the proper exercise of its powers. Furthermore, there was no need for the Board to postpone its decision with respect to termination of air express service until it had finally determined the issues pending in the *Air Express Rates*

Investigation (Docket 22387) or until the airlines had put into effect the new high-priority service as directed by the Board's order. Deferment of the orders presently under review until completion of the rates investigation would unduly delay a step believed by the Board to be essential, i.e., the termination of air express service, without any assurance that the investigation would yield findings requiring a change in the Board's decision. Since the high-priority service contemplated by the Board is not intended as a replacement of air express service but as an entirely new type of fast, airport-to-airport service not presently available, continuation of air express would not provide an interim substitute for the high-priority service sought by the Board. A further evidentiary hearing of the type ordered in *Ashbacher Radio Co.* v. *FCC*, 326 U.S. 327 (1945), is therefore not required in this case, where the Board has already held one evidentiary hearing. Lastly, for the reasons stated by the Board in its Order on Remand disapproving REA's November 21, 1974, agreement with most of the airlines, that agreement does not change the basic findings upon which the Board based its termination of air express service.

The Brotherhood of Railway and Airline Clerks ("BRAC") supports REA's application, arguing that the Board failed to make suitable provisions for the welfare of employees who would be displaced by termination of air express service. However, since no proposal was made to the Board for imposition of labor-protective conditions, the matter may not be considered initially by us, Federal Aviation Act of 1958, §1006(e), 49 U.S.C. §1486(e). Furthermore, the record reveals that the Board, apparently recognizing employee welfare as a factor to be considered in deciding what course would be in the public interest, *Air Line Pilots Assn.* v. *CAB*, 475 F.2d 900, 905 (D.C. Cir.

1973), granted air freight forwarder authority to REA specifically on the ground that its operations as a freight forwarder would provide the best opportunity to benefit its employees.

The Board's orders are affirmed.

ORDER OF CAB DATED MAY 13, 1975

Order 75-5-98

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 23rd day of May, 1975

Dockets 22387, 22388, 26238

Docket 27193, Agreement CAB 24824

EXPRESS SERVICE INVESTIGATION ET AL

AIR EXPRESS AGREEMENT,
REA EXPRESS, INC.
AND CERTAIN PARTICIPATING AIRLINES

O R D E R

In Order 75-4-54, the Board, at the direction of the United States Court of Appeals for the Second Circuit, reexamined its decision in the *Express Service Investigation* in light of the air express agreement and revised tariff filed subsequent to the time of the Board's earlier decision.[1] The Board concluded, upon reexamination, that the fundamental legal and policy issues

1. See Orders 73-12-36, 74-5-25, and 74-6-118.

which led to the Board's original decision were not altered by the subsequent agreement and tariff, and, therefore, the subsequent agreement was adverse to the public interest and should be disapproved. The Board's earlier decision was reaffirmed. REA Express, Inc., has filed a petition for reconsideration of Order 75-4-54. The Pet Industry Parties have filed an answer in support of the petition and Emery Air Freight and the Air Freight Forwarders Association have filed answers in opposition. We shall deny the petition.

REA makes five basic arguments. First, the petitioner contends that there is no showing that the air freight forwarders or the airlines can fully replace air express service. In this connection, REA claims that the Board's failure to comparatively evaluate its proposal with priority cargo service violates the *Ashbacker* doctrine.[2] Second, REA argues that the Board's most recent order improperly evaluated express rates *vis-a-vis* the rates of forwarders by comparing ordinary forwarder rates (based on consolidation of shipments) with REA's expedited service rates, and failed to consider likely rate increases. Third, REA claims that a hearing is required in order to resolve certain factual disputes associated with its transition from air express to air freight forwarder service. Fourth, REA asserts that the Board's concern that forwarders are excluded from various types of markets is obviated by the new tariff which allows forwarders to use REA's airport-to-airport express rates. Finally, REA makes an equitable argument that elimination of its express authority at this time would be unfair

2. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

to shippers and REA's employees, and that the Board should defer its decision pending the outcome of REA's Chapter XI bankruptcy proceeding.

Most of REA's arguments and contentions are, in essence, repetitions or variations of earlier contentions advanced to, and rejected by, the Board. Nothing in the petition for reconsideration establishes error in the Board's earlier decision or presents any matters that otherwise would warrant grant of the relief sought.

1. We see no basis for REA's assertion that it is entitled, under the *Ashbacker* notion, to yet another hearing. The Board has already completed a massive investigation of air express service in which it specifically compared, in detail, REA's service with ordinary air freight service. On the basis of the record established at the hearing, the Board concluded that REA's monopoly air express arrangement no longer offered any unique public benefits which would justify continuation of its special regulatory treatment. In addition, the Board concluded that there was a need for a new, but different, type of high-priority cargo service offered directly by the airlines. These two matters, although clearly related, are nevertheless distinct. While we recognize that the carriers have not, as yet, filed the necessary interline agreements and associated tariffs so as to be ready to fully implement this new service (on-line tariffs are in effect for certain carriers), we have every anticipation that they will do so once the uncertainty surrounding REA's express service is resolved by the Court of Appeals. REA's assertions that the

Board should not end REA's service "before its hypothetical replacement has appeared on the scene so that the pros and cons of each can be measured . . .," and that the need for its particular service has not been filled because the airlines have not developed their high-priority interline service, misconceive this fundamental distinction. The Board retains full regulatory authority to require the establishment of appropriate high priority service if affirmative Board action becomes necessary. More importantly for present purposes, further regulatory action to insure the implementation of the new service would not, in any event, include a reactivation of REA's express monopoly as a "substitute."[3]

We find it unnecessary, at this juncture, to pass upon REA's further arguments that high priority service rates are likely to be higher than existing air express rates, and that the difference between express rates (if retained) and freight rates are likely to increase.[4] The new high priority service will be different from REA's current service and may well be a higher cost service.[5]

3. We are not persuaded by REA's attempt to elevate the priority freight issue to one of major decisional significance. In the context of the overall case, it was merely a minor part of our conclusion that air express service, *per se*, had outlived its usefulness. To the extent that the petitioner may also argue that its new airport-to-airport service is entitled to a comparative evaluation with the new high priority service, suffice it to say that, as discussed more fully *infra*, we are not prepared to place priority service in the hands of a single carrier.

4. REA points to the increases recommended by Judge Present in the Domestic Air Freight Rate Investigation, Docket 22859. Judge Present's decision is now before the Board for review.

5. Tariffs filed by individual carriers show a 30 percent increase in rates when compared with the airlines' existing standard line-haul freight rates. See, *e.g.*, Order 75-5-34, May 8, 1975. These tariffs are the subject of a Board investigation and hearing in the Priority Reserved Air Freight Rates Investigation, Docket 26838.

However, the Board has power to insure that such rates are reasonable. While ordinary freight rates may increase in the future, there is no showing that the relationship between forwarder rates and REA's rates, which are now more or less the same, would change appreciably.[6]

2. The Board properly evaluated REA's new express rates *vis-a-vis* the rates of other air freight forwarders. We compared the rates for REA's service with the rates for the forwarders' standard service in view of our earlier determination that REA's service offers no advantage in terms of speed of delivery. Thus, the fact that the forwarders offer an even faster service is immaterial. Indeed, REA shares the Board's view of the appropriate competitive comparison since Appendix B to Order 75-4-54, which detailed our comparison, was taken, in terms, from REA's justification filed with its proposed November 4 tariff.

3. No further hearing is required to resolve any conflicting evidentiary matters. As noted above, an extensive evidentiary hearing has already been held, and we do not read the court's remand order — which was the impetus for the reconsideration of our earlier decision — as requiring a new evidentiary hearing. Nor is one justified. Our original decision concluded that, with the possible exception of air express rates for small package shippers, express service no longer offered any unique public

6. REA makes an argument that its costs will continue to be lower than those of the air freight forwarders and that this will inure to the benefit of the shipping public. The recent changes in REA's rates belie this argument.

benefits. Subsequently, we noted that even the rates advantage had evaporated. Whether or not particular shippers would continue to favor REA — and we have no reason to doubt that some shippers will prefer REA's forwarder service — does not change our fundamental conclusion that REA is no longer entitled to a preferred position in the air cargo business.[7]

4. Our original decision concluded, *inter alia,* that the elimination of the REA monopoly and the opening up of air express markets to all indirect carriers, including REA, will best promote the future growth of a dependable air freight service, particularly with respect to small-package shipments. REA points out that its more recent tariff now includes airport-to-airport as well as door-to-door rates, and argues from this that forwarders may now expand into new markets by utilizing REA's air express service on an airport-to-airport basis. We do not believe that this factor obviates the fundamental problem. Under REA's proposal, the carrier's monopoly would be continued despite the Board's conclusion, reiterated in Order 75-4-54, that continuation of this arrangement runs contrary to the spirit of the antitrust laws and is not justified by any counterbalancing public benefits. Moreover, REA would, under its proposal, retain control over all express shipments, including those of its competitors, and this appears to us to be counterproductive to the fullest development of priority service. Moreover, adoption of REA's approach would simply subject

7. We are unimpressed by REA's apparent confusion over our finding that it has already made the transition from air express to air freight forwarding. The carrier's argument, reduced to fundamentals, is simply a restatement of its historic position that its service continues to be unique. That position is simply wrong.

priority service to all the historic and potential uncertainties associated with REA's monopoly.[8]

5. Finally, we see no equitable basis for a deferral in the implementation of our earlier decision. We do not believe that the possible effect on REA's employees or shippers, or the pendency of REA's bankruptcy proceeding, warrants further delay. We must point out, again, that the Board has never contemplated the elimination or demise of REA, with any loss of jobs for its employees. Rather, the Board seeks to expand the development of air freight service generally and permit REA to play a constructive role in that development, with all the rights and opportunities for successful operation enjoyed by existing forwarders. Such action should work to the benefit of REA's employees. Significantly, REA does not request, as a remedy, the imposition of conditions to protect its employees. Rather, it argues that considerations of employee security should override all other public interest factors so as to "require the continuation of Air Express. . . ." Although we are sympathetic to any difficulties which may be faced by REA's employees, we do not believe either that our action has been a major contributing factor to employee dislocations[9] or that the problems faced by REA's remaining employees justifies a complete reversal of our

8. REA asserts, citing Order 74-9-4, that the Board has found that high priority service is a "replacement for air express." That characterization is misleading insofar as it suggests identity — rather than overlap — between the two forms of service. It is the Board's position, notwithstanding use of the word "replacement" in Order 74-9-4, that the record established that air express is not comparable to high priority service. See Order 73-12-36.

9. REA has already severely contracted its operations and staff although the Board's decision is yet to take effect.

original decision. Similarly, as fully detailed in our earlier decisions, we believe that the transition of REA from express operator to forwarder, and the entry of direct carriers and forwarders into the priority cargo market, will eventually inure to the benefits of the shipping public.

In like fashion, we do not believe that our decision should be deferred pending completion of the bankruptcy proceedings. First, we believe that REA's best hope for survival as part of the air cargo system is by operating as an air freight forwarder. The formal transition from express operator to forwarder should be completed as promptly as possible. Second, we believe the bankruptcy court is entitled to the benefit of the Board's judgment in this respect so that it may move forward to remedy REA's financial difficulties in the most productive fashion. Any deferral of action on the Board's part might be improperly viewed as a vacillation with respect to the Board's determination of REA's future role.

ACCORDINGLY, IT IS ORDERED THAT: REA's petition for reconsideration be and it hereby is denied.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

ORDER OF CAB DATED APRIL 9, 1975

Order 75-4-54

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 9th day of April, 1975

Dockets 22387, 22388 and 26238
Docket 27193, Agreement CAB 24824

EXPRESS SERVICE INVESTIGATION ET AL.

AIR EXPRESS AGREEMENT,
REA EXPRESS, INC.
AND CERTAIN PARTICIPATING AIRLINES

ORDER ON REMAND AND DISAPPROVING AGREEMENT

INTRODUCTION

The Board once again has before it the question of the on-going relationship between the airlines and REA Express, Inc., with regard to air express service. In the original decision in the *Express Service Investigation,* Docket 22388, the Board (a)

disapproved, as contrary to the public interest, the existing air express service arrangement (Agreements CAB 12866 and 17935) between the airlines and REA and cancelled REA's existing air express exemption, (b) issued air freight forwarder authority to REA, and (c) concluded that each scheduled air carrier has an obligation to offer priority freight service as part of its duty to provide adequate interstate and overseas air transportation. In a related proceeding,[1] the Board authorized inter-carrier discussions of priority air cargo services. REA petitioned the United States Court of Appeals for the Second Circuit to review the various Board decisions and the court stayed the Board's decision in the *Express Service Investigation* insofar as it ordered an end to the existing air express arrangement. By Order 74-11-11, November 1, 1974, the Board allowed a new air express tariff structure to become effective, although it did not deal with the underlying question, at issue here, concerning the continued approval or disapproval of the agreements and exemption which provides for air express service.

Thereafter, on November 22, 1974, a new air express agreement was filed with the Board for approval. The new agreement, if approved by the Board, would become effective the day after Board approval, would be of continuous duration, and would supersede the old Air Express Agreement (Agreement CAB 17935, Docket 22388) which would be terminated.[2] On

1. See Orders 74-2-118, 74-4-1, 74-5-74, and 74-11-26.

2. Answers with respect to this agreement were filed by the Air Freight Forwarders Association, Emery Air Freight Corporation, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), and the (Cont'd)

December 23, 1974, the Court of Appeals remanded the judicial proceeding to the Board in order that the Board might reconsider its earlier decisions "in light of the Board's disposition of the Air Express Agreement executed and filed on November 22, 1974, and other relevant circumstances, including the revised Air Express Tariff effective November 4, 1974 . . . ."

In general, the arguments made in support of approval of the new Air Express Agreement are that it would allow for the continuation of service which some shippers desire; that it would eliminate the problems associated with the old agreement as they were described by the Board in the *Express Service Investigation,* Docket 22388, particularly when viewed together with the new air express tariffs; that it would permit REA to achieve a healthy financial status; that the new agreement is the best method of providing the public with priority air express service; and that it would limit competition to the extent necessary to achieve the efficiencies of a single ground agent for air express. The arguments presented in opposition to approval are that the new agreement would not really change the nature

(Cont'd)
Pet Industry Council, and a reply was filed by the applicants. In addition, informal "protests" or "objections" to the new agreement were received from four humane associations, including the American Society for the Prevention of Cruelty to Animals. Also, a reply was filed by the Drug and Toilet Preparation Traffic Conference and the National Small Shipments Traffic Conference, Inc., together with a motion for leave to file an unauthorized document. This filing will be treated as a late-filed answer and will be accepted. Finally, United submitted, in Docket 22388, a motion to file an otherwise unauthorized document, accompanied by "Comments" purportedly directed to matters pending in Docket 22388. REA, in response, argues that since the Board has not requested comments in Docket 22388, United's submission is, in effect, an untimely response to the new Air Express Agreement. We shall deny United's motion.

of the air express arrangement; that it would not controvert the Board's previous findings that the anticompetitive aspects of this arrangement are not overcome by a serious transportation need or important public benefits; that REA would retain control over all air express shipments, even those of its competitors; that the possibility of future air express crises would not be eliminated by the new agreement; that the air express rate and revenue division structure unfairly favors REA over other indirect carriers and possibly the airlines; and that this agreement would not make a feasible form of air express service available to other indirect air carriers, but would prevent the establishment of the high-priority air cargo service which the Board has directed the airlines to offer to the public. Another argument in opposition is that the agreement does not specifically provide for the proper care of animals shipped in air express.

In view of the matters presented, and in compliance with the court's directive, we have considered the new agreement and related tariff– both independently and in connection with our earlier decision– and have concluded that the agreement of November 22 is adverse to the public interest and should be disapproved and that the Board's earlier decision should be reaffirmed.

SUBSTANTIVE MATTERS

The fundamental legal and policy issues which underlie the present manner in which air express service is performed–*i.e.*,

pursuant to an agreement among the airlines (Agreement CAB 12866) and an agreement between the airlines and REA as the monopoly air express indirect carrier (Agreement CAB 17935)– were fully examined in the *Express Service Investigation,* where the Board concluded that the existing air express arrangement did not offer any unique public service benefits which would justify its continuation. On the contrary, the evidence conclusively showed that the original air express format developed prior to 1938 had been rendered obsolete by more recent developments, including particularly, the expansion of air freight forwarder operations and air cargo operations by the airlines themselves. Based on the extensive record in the *Express Service Investigation*, the Board found that air express no longer offered the public superior speed or commodity and geographic coverage which once distinguished it from other air cargo services and thereby justified its unique treatment by the Board. Only in the area of rates to small package shippers was there some evidence that REA had maintained its historic advantage. In addition, the Board found that air express service under the existing regime would remain in constant danger of sudden suspension and that such uncertainty was clearly adverse to the public interest. Finally, the Board concluded that elimination of the REA monopoly and the opening up of air express markets to all indirect carriers, including REA, will best promote the future growth of a dependable air freight service, particularly with respect to small-package shipments. The modifications to the air express arrangement recently submitted do not undermine-nor, indeed, address-these fundamental bases for the Board's earlier decision. (The major differences between the new

and old agreements and tariffs are set out as an appendix to this opinion and order.) On the other hand, recent developments generally reinforce the Board's earlier determination. In sum, we see no basis for approving the current agreement or altering our earlier decision.[3]

Nothing in the current submissions warrants any change in our earlier finding that the existing air express arrangement no longer provides any unique public service advantages. On the contrary, it now appears that any alleged benefits have materially deteriorated. Significantly, Delta, Southern, United, Piedmont, Pan American, and Ozark have already withdrawn from the express arrangement. Thus, the nationwide coverage which was a principal public benefit of REA's service has been ended. Furthermore, REA's air express tariffs and pickup, and delivery service are now similar to those of forwarders and other air freight carriers. The recently established air express rate structure, effective November 4, 1974, is also not materially different from that of freight forwarders in general, particularly with respect to smaller packages.[4] Reductions proposed in

3. We are sympathetic to the concerns of the humane societies, but since our action herein is to disapprove the agreement, we will not deal specifically with the matters raised by the humane societies in this order. In Docket 26310 the Board is conducting an investigation of the rules and practices relating to the acceptance and carriage of live animals in domestic air freight transportation. Any changes in the treatment of animals which that Investigation shows to be necessary would seem to be appropriate for any type of air cargo system in effect at that time, and it is suggested that the humane societies direct their attention to Docket 26310. See Orders 74-1-79 and 74-7-26.

4. See Apendix B to this order. See, also, Order 74-11-11, November 1, 1974.

numerous rates, marked to become effective April 30, 1975, will, if permitted to become effective by the Board, bring the express structure even closer to that of forwarders. And, as the Board noted in its original decision, the designation of a shipment as air express does not, in practice, result in any faster service than if the package were sent as air freight. Finally, REA has, in essence, already made the transition from air express to air freight forwarding so that any change in formal authorization will have virtually no effect on the type of service available to the public. The only remaining distinction btween REA and air freight forwarders is in nomenclature and privilege which do not translate into any meaningful benefits to the shipping public.

There is little doubt that the strength of the REA/airline arrangement has been further eroded since the time of the Board's original decision. As noted earlier, various airlines have withdrawn from the basic air express agreement. Furthermore, the conflicting interests of REA and its remaining airline "partners" nonetheless continues, even under the new arrangement. Also, under that new arrangement air express services would end ten days after any default by REA to the airlines. Moreover, section IV of the new agreement plainly says that all adjustments and increases in air express rates can be vetoed by either REA or the airlines. Equally important, subsequent to the time of the Board's earlier decision REA filed a petition initiating a bankruptcy action in the Federal courts. In all these circumstances, we can only conclude that the new air express agreement is no more stable than the earlier arrangement was at the time of our original decision.

Finally, and importantly, we continue to believe that the future development of air freight, including the benefits to the public of a reliable form of cargo service, can best be achieved by allowing other indirect carriers to participate in priority service so that a dependable service can be established. As we indicated in our Supplemental Opinion and Order 74-5-25, at pp. 12-13:

> "The air express agreements are plainly anticompetitive, and have the effect of eliminating competition between airlines and excluding airfreight forwarders from various types of markets . . . [T]he air express agreements do not produce counter-balancing public benefits, but rather stand in the way of the establishment of an improved air cargo system . . . . Disapproval of the air express agreements is fully in keeping with the spirit of the antitrust laws. It is the perpetuation of them that would have been contrary to that spirit. And we are not aware of any supervisory responsibility imposed on us that requires us to attempt to aid an unhappy partner to an arrangement that has outlived its time. . . ."

Not only will our new approach remove the ever-present threat that the only available express service may suddenly disppear, but it will foster the usual competitive interplay which we believe

desirable in bringing about improved air freight service to the public.[5]

PROCEDURAL MATTERS

The Board has also reexamined its earlier determination regarding the need for a new high-priority air cargo service since this was a part of the Board order remanded by the Court in light of the proposed new air express agreement. After careful consideration, we find nothing in the new agreement to alter our earlier conclusion that there are a limited number of commodities requiring the fastest possible service, that air express does not fill the need for priority service, and that, accordingly, each air carrier has an obligation to meet this limited need with a high-priority service of its own. In connection with the proposed agreement, we find no indication that air express service would be any more successful than under the current agreement in meeting the need for high-priority service.

In order to establish high-priority service, we permitted the airlines to hold discussions concerning the development of interlining procedures and the like for this new service.[6] The air carriers have now had more than one year to conduct those discussions, but most have not yet filed with the Board their tariffs and any necessary interline agreements. While such

5. See, generally, Household Goods Air Freight Forwarder Investigation, Order 72-7-33, July 10, 1972.

6. Orders 74-2-118, 74-4-1, 74-5-74 and 74-11-26.

reticence may be understandable in light of the court order staying this and other aspects of the *Express Service* decision, it must be emphasized that the public interest requires the establishment of this service as soon as possible. Accordingly, we will grant the pending request in Docket 26238 and authorize further discussions by the airlines. This authorization will expire fourteen days after the issuance of the court's mandate in *REA v. CAB*, No. 74-1611. Moreover, by that fourteenth day, the Board expects the airlines to have submitted the tariffs for high-priority service as well as whatever agreement or agreements are necessary to accomplish the essential interlining aspects of the service.[7] The tariffs and agreements should be marked to become effective no later than 90 days after the issuance of the court's mandate.

In this fashion, the status quo protected by the court's stay is not disturbed, for while the carriers are free to discuss and formulate whatever procedures are necessary, no action will be taken and no new industry-wide service will begin until after the dissolution of the stay. At the same time, this directive will have the beneficial effect of implementing our earlier determination on the need for high-priority service as soon as possible.

Finally, as noted above, REA and the participating airlines have filed, on March 27, 1975, a new air express tariff marked for effectiveness on April 30, 1975. That tariff, *inter alia*,

7. We note that the airlines participating in the discussions essentially agreed on an interline agreement on June 11, 1974. Very little additional work would seem necessary. The Board will expect that the agreement provide for an interline service which is consistent with the public interest.

provides for price reductions at sixty-three cities which REA estimates would recapture traffic lost since implementation of its November increases. Since the Board has not yet passed upon the new tariff, in detail, we of course offer no views upon it except to note that the new filing provides no reason for the Board to stay its decision here.

ACCORDINGLY, IT IS ORDERED THAT:

1. Agreement CAB 24824 be and it hereby is disapproved;

2. The reply of the Drug and Toilet Preparation Traffic Conference and the National Small Shipment Traffic Conference is accepted;

3. The authorization granted in Order 74-2-118, as extended by Order 74-11-26, be and it hereby is further extended until 14 days after the issuance of the mandate of the United States Court of Appeals for the Second Circuit in *REA v. CAB*, No. 74-1611.[8]

4. Except to the extent granted herein, all applications, motions and requests be and they hereby are denied.

By the Civil Aeronautics Board:

(Seal) EDWIN Z. HOLLAND

Secretary

8. The discussions shall be subject to the conditions imposed in Order 74-11-26.

APPENDIX A
Page 1 of 2 pages

Major differences between the new and old Air Express Agreements and Tariffs

1. The new agreement would have no termination date; the old agreement expired after 5 years.

2. Withdrawal by any party from the new agreement would require 12 months' notice; the old agreement required only 6 months' notice for withdrawal.

3. In case of default by REA on any payment due the airlines, the airlines' obligations under the new Air Express Agreement would be terminated, and all money owed the airlines by REA would become due 10 days after default; the old agreement merely provided for termination of the agreement in the case of certain bankruptcy actions by any party.

4. REA, under the new agreement, would pay the airlines for the airlines' services in ground handling of air express shipments when no REA employees are at an airport ($4 per shipment; $5 for animals); the old agreement had no similar provision.

5. The procedures for the provision by REA of substitute service (surface transportation of air express shipments in those cases where air service is, or is alleged to be, unavailable or insufficient) would be clarified in the new agreement; they were less clear in the old agreement.

6. The new agreement would specify that no changes in the air express tariffs would be made without the written authorization of the airlines; in the old agreement this was not clearly required. (In both the new and old agreements, air express rates are to be set jointly by REA and the airlines).

7. In the new agreement, air express revenue would be divided among REA and the airlines twice a month; under the old agreement REA allocated and paid the airlines their share of the revenue once a month.

8. The new agreement specifies that the airlines and REA would waive the right to request the CAB to change the new Air Express Agreement, and to retroactively readjust the air express revenue divisions between REA and the airlines. Also, REA would request the CAB to dismiss REA's request for such readjustment in docket 22387.

9. The new air express tariffs provide separate charges for airport-to-airport air express service, on the one hand, and pickup and/or delivery of air express shipments, on the other hand. REA retains the full pickup-and-delivery charges, if any, on particular shipments, and REA and the airlines divide the air shipment charges, in accordance with an agreed-upon-allocation-of-revenue schedule. The old tariff only provided for door-to-door air express rates.

10. The new air express tariffs provide for three categories of city-pair markets, with the rates for large city to large city

(column A) shipments the lowest, the rates for small city to small city (column C) shipments the highest, and the rates for large city to or from small city (column B) shipments in between, for each category (mileage/weight) of shipment. The airlines' share of the total charge is the same regardless of which column a shipment falls into, while REA's share (and thus the total charge) is higher in column B and A, and in C and B. The old tariff had no similar provision.

Appendix B *

COLUMN A

EXHIBIT 3

COMPARISON OF PROPOSED AIR EXPRESS CHARGES WITH CHARGES OF AIR FREIGHT FORWARDERS

FROM - TO	WEIGHT IN POUNDS 1	5	10	25	50	70	100	200	300	Service Provided in both Directions	ZONE I Pickup	Delivery
	CHARGE IN CENTS IS										Charge in Cents IS	
Atlanta, Ga. - Charlotte, N.C.												
Air Express	950	950	1500	1550	1550	1654	1959	3346	4821	Yes	335	275
Emery	747	747	1600	2000	2444	2690	3017	5128	7554	Yes	335	275
Airborne	711	969	1452	1913	2576	2747	3005	6010	8031	Yes	285	275
Buffalo, N.Y. - Boston, Mass.												
Air Express	950	950	1500	1571	1908	2204	2653	4932	7197	Yes	350	350
Emery	747	747	1600	2033	2530	2818	3209	5490	8064	Yes	350	350
Airborne	711	978	1473	1965	2683	2897	3219	6439	8697	Yes	305	325
Baltimore, Md. - Ft. Wayne, Ind.												
Air Express	950	950	1500	1681	2156	2536	2998	5302	7614	Yes	400	300
Emery	1037	1037	1643	2097	2670	3017	3523	6263	8454	Yes	400	300
Airborne	711	1020	1557	2179	3112	3499	4073	8156	11376	Yes	300	250
Cleveland, Ohio - Hartford, Conn.												
Air Express	950	950	1500	1757	2330	2744	3134	5576	8025	Yes	330	350
Emery	747	747	1600	2033	2530	2818	3209	5490	8064	Yes	330	350
Airborne	711	978	1473	1965	2683	2897	3219	6439	8697	Yes	300	250
New York, N.Y. - Chicago, Ill.												
Air Express	950	950	1500	1901	2576	2973	3594	5922	8235	Yes	525	375
Emery	747	747	1600	2118	2764	3170	3772	6440	9027	Yes	525	375
Airborne	711	989	1494	2019	2790	3048	3433	6866	9369	Yes	525	300
Columbus, Ohio - Omaha, Neb.												
Air Express	950	950	1500	1901	2576	2973	3584	5922	8235	Yes	265	275
Emery	747	747	1600	2181	2929	3432	4181	7454	9795	Yes	265	275
Airborne	711	1031	1578	2231	3219	3649	4292	8584	12042	Yes	250	250
Chicago, Ill. - Dallas, Tex.												
Air Express	950	950	1500	1943	2698	3095	3325	6030	8334	Yes	375	300
Emery	747	747	1600	2181	2929	3432	4181	7454	9795	Yes	375	300
Airborne	711	999	1515	2072	2897	3198	3649	7298	10035	Yes	300	300

* REA Explanation of Proposed Changes in Rates and Charges, Official Air Express Tariff No. 1, CAB No. 1 and Proposed Air Express Pickup & Delivery Tariff No. 1, CAB No. 2 Submitted September 30, 1974

COLUMN A - Continued

EXHIBIT 3

ZONE I

FROM - TO	WEIGHT IN POUNDS 1	5	10	25	50	70	100	200	300	Service Provided in both Directions	Pickup Charge in Cents IS	Delivery Charge in Cents IS
New York, N.Y. - Jacksonville, Fla.	CHARGE IN CENTS IS											
Air Express	950	950	1500	1943	2698	3095	3825	6030	8334	Yes	525	315
Emery	1037	1037	1643	2260	3107	3699	4569	8394	11645	Yes	525	315
Airborne	711	1041	1599	2285	3326	3793	4506	9012	12714	Yes	525	250
Denver, Colo. - Chicago, Ill.												
Air Express	950	950	1550	2054	2828	3200	4088	6292	8727	Yes	355	375
Emery	747	747	1600	2039	2708	3036	3637	6240	8339	Yes	355	375
Airborne	711	999	1515	2072	2897	3193	3549	7298	10035	Yes	305	300
Houston, Tex. - Dayton, Ohio												
Air Express	950	950	1550	2054	2828	3200	4038	6292	8727	Yes	400	265
Emery	747	747	1600	2076	2650	2939	3499	6076	8610	Yes	400	265
Airborne	711	1041	1599	2285	3326	3793	4506	9012	12714	Yes	300	250
Kansas City, Kans. - Phoenix, Ariz.												
Air Express	950	950	1575	2094	2843	3373	4377	6788	9366	Yes	350	250
Emery	747	747	1600	2200	2938	3524	4322	7790	10167	Yes	350	250
Airborne	711	1031	1578	2231	3219	3649	4292	8584	12042	Yes	300	250
Tulsa, Okla. - Los Angeles, Calif.												
Air Express	950	950	1650	2331	3151	3805	4955	8184	10635	Yes	260	350
Emery	747	747	1600	2210	3031	3599	4433	7828	10374	Yes	260	350
Airborne	711	1031	1578	2231	3219	3649	4292	8584	12042	Yes	250	350
Pittsburgh, Pa. - Salt Lake City, Ut.												
Air Express	950	950	1725	2535	3539	4248	5678	9364	12387	Yes	300	270
Emery	747	747	1600	2302	3310	4039	5107	9234	12459	Yes	300	270
Airborne	711	1073	1662	2444	3649	4249	5151	10302	14718	Yes	280	250
New York, N.Y. - Los Angeles, Calif.												
Air Express	950	950	1780	2834	4121	5100	6747	11722	15606	Yes	525	350
Emery	747	747	1600	2481	3828	4815	6284	11698	16026	Yes	525	350
Airborne	711	1094	1704	2550	3863	4549	5580	11160	16059	Yes	525	350
Miami, Fla. - Portland, Ore.												
Air Express	950	950	1810	3010	4383	5516	7207	12950	17637	Yes	350	300
Emery	747	747	1600	2481	3828	4815	6234	11698	16026	Yes	350	300
Airborne	711	1115	1746	2656	4078	4950	6009	12018	17394	Yes	325	300

COLUMN B

EXHIBIT 3

COMPARISON OF PROPOSED AIR EXPRESS CHARGES WITH CHARGES OF AIR FREIGHT FORWARDERS

ZONE I

FROM-TO	WEIGHT IN POUNDS 1	5	10	25	50	70	100	200	300	Service Provided in both Directions	Pickup Charge in	Delivery Cents IS
	CHARGE IN CENTS IS											
Rochester, N.Y. - Lansing, Mich.												
Air Express	1100	1100	1525	1700	2029	2249	2615	4794	6972	Yes	325	250
Emery	1464	1464	1718	2105	2636	2946	3454	6218	9327	Yes	325	250
Airborne	711	1010	1536	2125	3005	3348	3863	7726	10704	No	300	250
Allentown, Pa. - Buffalo, N.Y.												
Air Express	1100	1100	1525	1700	1850	1954	2159	3946	5721	Yes	250	350
Emery	1037	1037	1643	2100	2695	3057	3590	6420	8661	Yes	250	350
Airborne	711	968	1452	1913	2576	2747	3005	6010	8031	Yes	250	305
Elmira, N.Y. - Boston, Mass.												
Air Express	1100	1100	1525	1700	2029	2249	2615	4794	6972	Yes	285	350
Emery	1037	1037	1643	2100	2695	3057	3590	6420	8661	Yes	285	350
Airborne	711	968	1452	1913	2576	2747	3005	6010	8031	Yes	250	325
Baltimore, Maryland - Lexington, KY.												
Air Express	1100	1100	1525	1828	2479	2916	3448	6098	8757	Yes	400	250
Emery	1037	1037	1643	2097	2670	3017	3523	6268	8454	Yes	400	250
Airborne	711	1020	1557	2179	3112	3499	4078	8156	11376	Yes	300	250
Manchester, N.H.-Cleveland, Oh.												
Air Express	1100	1100	1525	1930	2680	3156	3604	6412	9228	Yes	275	330
Emery	1606	1606	1874	2306	2902	3263	3871	7060	10590	Yes	275	330
Airborne	1711	1978	2473	2965	3683	3897	4219	8438	11697	Yes	250	300
Binghamton, N.Y. - Chicago, Ill.												
Air Express	1100	1100	1525	1938	2680	3156	3604	6412	9228	Yes	250	375
Emery	1037	1037	1643	2145	2810	3230	3871	6986	9513	Yes	250	375
Airborne	711	1031	1578	2231	3219	3649	4292	8584	12042	Yes	250	300
Charlotte, NC. - Peoria, Ill.												
Air Express	1100	1100	1525	2053	2962	3419	4122	6810	9471	Yes	275	250
Emery	1037	1037	1643	2282	3165	3792	4706	8672	12060	Yes	275	250
Airborne	711	1020	1557	2179	3112	3499	4078	8156	11376	No	275	250

COLUMN B - Continued

EXHIBIT 3

WEIGHT IN POUNDS

FROM - TO	1	5	10	25	50	70	100	200	300	Service Provided in Both Directions	ZONE I Pickup Charge in Cents IS	ZONE I Delivery Cents IS
	CHARGE IN CENTS IS											
Miami, Fla. - New Bern, N.C.												
Air Express	1100	1100	1525	2053	2962	3419	4122	6810	9471	Yes	350	300
Emery	1634	1634	1909	2358	2981	3367	4006	7352	11028	Yes	350	300
Airborne	1711	2020	2557	3179	4112	4499	5078	10156	14376	No	325	250
Des Moines, Ia. - Houston, Tex												
Air Express	1100	1100	1525	2136	3091	3559	4399	6934	9585	Yes	250	400
Emery	747	747	1600	2140	2824	3258	3918	6616	9249	Yes	250	400
Airborne	711	1052	1620	2337	3433	3948	4722	9444	13380	Yes	250	300
Houston, Tex. - Lincoln, Neb.												
Air Express	1100	1100	1525	2136	3091	3559	4399	6934	9585	Yes	400	265
Emery	1690	1690	1988	2495	3204	3683	4431	8190	12285	Yes	400	265
Airborne	711	1041	1599	2285	3326	3798	4506	9012	13518	No	300	250
Omaha, Neb. - Midland, Tex.												
Air Express	1100	1100	1575	2214	3252	3879	5034	7806	10770	Yes	275	250
Emery	1690	1690	1988	2495	3204	3683	4431	8190	12285	No	275	250
Airborne	711	1020	1557	2179	3112	3499	4078	8156	11376	No	250	250
Pittsburgh, Pa. - Fort Smith, Ark.												
Air Express	1100	1100	1600	2302	3269	3879	5034	7806	10770	Yes	300	300
Emery	1776	1776	2090	2650	3450	3999	4855	9046	13569	Yes	300	300
Airborne	1711	1989	2494	3019	3790	4048	4433	8866	12369	No	280	300
St. Louis, Mo. - Las Vegas, Nev.												
Air Express	1100	1100	1725	2534	3688	4479	6039	9646	12579	Yes	350	350
Emery	1032	1032	1636	2313	3269	3953	4968	9190	12846	Yes	350	350
Airborne	711	1084	1683	2497	3756	4399	5365	10730	15387	Yes	275	350

COLUMN B - Continued

EXHIBIT 3

FROM - TO	WEIGHT IN POUNDS 1	5	10	25	50	70	100	200	300	Service Provided in Both Directions	ZONE I - Pickup Charge in Cents IS	Delivery
	CHARGE IN CENTS IS											
Madison, Wisc. - Portland, Ore.												
Air Express	1100	1100	1800	2734	4070	4885	6530	10768	14244	Yes	260	300
Emery	1032	1032	1636	2334	3326	4044	5111	9466	13257	Yes	260	300
Airborne	711	1084	1683	2497	3756	4399	5365	10730	15387	Yes	250	300
Rochester, NY. - Bakersfield, Calif.												
Air Express	1100	1100	1850	3111	4739	5865	7759	13480	17946	Yes	325	250
Emery	1926	1926	2315	3134	4417	5314	6710	12808	19212	Yes	325	250
Airborne	711	1115	1746	2556	4078	4850	6009	12018	17394	No	300	250

EXHIBIT 3

COMPARISON OF PROPOSED AIR EXPRESS CHARGES WITH CHARGES OF AIR FREIGHT FORWARDERS

FROM - TO	WEIGHT IN POUNDS: 1	5	10	25	50	70	100	200	300	Service Provided in both Directions	ZONE I: Pickup Charge in Cents IS	ZONE I: Delivery Charge in Cents IS
	CHARGE IN CENTS IS											
Pensacola, Fla.-South Bend, Ind.												
Air Express	1600	1600	1925	2523	3494	4024	4973	7840	10833	Yes	250	350
Emery	1822	1822	2150	2740	3602	4188	5111	9569	14352	Yes	250	350
Airborne	711	1041	1599	2285	3326	3793	4506	9012	12714	Yes	250	250
Pensacola, Fla. - Amarillo, Tex.												
Air Express	1600	1600	1950	2621	3675	4160	5314	8180	11346	Yes	250	250
Emery	1822	1822	2150	2740	3602	4188	5111	9569	14352	Yes	250	250
Airborne	711	1020	1557	2179	3112	3499	4078	8156	11376	Yes	250	250
Moline, Ill. - Sheridan, Wyo.												
Air Express	1600	1600	1950	2621	3676	4160	5314	8180	11346	Yes	325	250
Emery	1935	1935	2269	2903	3953	4488	5494	10340	15510	No	325	NSA
Airborne	1711	2052	2620	3337	4433	4948	5722	11444	16380	No	250	250
Fargo, N.D. - Lynchburg, Va.												
Air Express	1600	1600	2100	2974	4096	4579	6046	10348	13125	Yes	250	250
Emery	1747	1747	2056	2595	3355	3894	4706	8772	13158	Yes	250	250
Airborne	711	1052	1620	2337	3433	3948	4722	9444	13380	Yes	250	250
Albuquerque, N.M. - Spokane, Wash.												
Air Express	1600	1600	2075	2884	3968	4801	6338	10528	13476	Yes	250	300
Emery	1032	1032	1536	2313	3269	3953	4369	9190	12846	Yes	250	300
Airborne	711	1052	1620	2337	3433	3948	4722	9444	13380	Yes	250	300
Tucson, Ariz. - Aberdeen, Wash.												
Air Express	1600	1600	2150	2993	4159	5064	6826	10904	14220	Yes	250	350
Emery	1822	1822	2150	2740	3602	4188	5111	9568	14352	No	250	NSA
Airborne	1711	2031	2578	3231	4219	4649	5292	10584	15042	No	250	350
Richmond, Va. - Alamogordo, N.M.												
Air Express	1600	1600	2275	3234	4601	5522	7381	12174	16104	Yes	250	250
Emery	1926	1926	2290	3020	4155	4938	6158	11696	17529	No	250	NSA
Airborne	1711	2094	2704	3550	4863	5549	6580	13160	19059	No	300	250
Elmira, N.Y. - Walla Walla, Wash.												
Air Express	1600	1600	2320	3554	5140	6327	8329	14163	18991	Yes	285	250
Emery	1926	1926	2315	3134	4417	5314	6710	12803	19212	No	285	250
Airborne	1711	2115	2746	3656	5078	5850	7009	14019	20394	No	250	350

EXHIBIT 3

COMPARISON OF PROPOSED AIR EXPRESS CHARGES WITH CHARGES OF AIR FREIGHT FORWARDERS

FROM - TO	WEIGHT IN POUNDS: 1	5	10	25	50	70	100	200	300	Service Provided in both Directions	ZONE I Pickup	ZONE I Delivery
	CHARGE IN CENTS IS										Charge in Cents IS	
Spokane, Wash. - Pendleton, Ore.												
Air Express	1600	1600	1925	2000	2050	2154	2417	4350	6321	Yes	300	250
Emery	1436	1436	1696	2066	2566	2352	3310	5942	8913	No	300	250
Airborne	1711	2010	2536	3125	4005	4348	4363	9726	13704	No	300	250
Des Moines, Iowa - Springfield, Mo.												
Air Express	1600	1600	1925	2000	2248	2534	2956	5418	7881	Yes	250	250
Emery	1549	1549	1803	2204	2743	3065	3590	6496	9744	Yes	250	250
Airborne	711	1020	1557	2179	3112	3499	4078	8156	11376	No	250	250
Muskegon, Mi. - Burlington, Iowa												
Air Express	1600	1600	1925	2000	2249	2534	2956	5419	7881	Yes	275	275
Emery	1464	1464	1719	2105	2635	2946	3454	6218	9327	No	275	275
Airborne	1711	2010	2536	3125	4005	4348	4363	9726	13704	No	275	250
Austin, Tex. - El Dorado, Ark.												
Air Express	1600	1600	1925	2018	2480	2865	3449	6412	9357	Yes	300	250
Emery	1663	1663	1942	2409	3059	3472	4151	7626	11439	Yes	300	250
Airborne	711	1010	1536	2125	3005	3348	3863	7726	10704	No	250	250
Alexandria, La. - Charleston, S.C.												
Air Express	1600	1600	1925	2426	3349	3865	4659	7693	10770	Yes	250	300
Emery	1522	1522	1772	2163	2697	3010	3523	6368	9552	Yes	250	300
Airborne	1711	2020	2557	3179	4112	4499	5078	10156	14376	Yes	250	275
Quincy, Il. - Grand Forks, N.D.												
Air Express	1600	1600	1925	2283	3029	3567	4074	7248	10414	Yes	275	250
Emery	1663	1663	1942	2409	3059	3472	4151	7626	11439	No	275	250
Airborne	1711	2020	2557	3179	4112	4499	5078	10156	14376	No	265	250
Greenville, S.C. - Fayetteville, Ark.												
Air Express	1600	1600	1925	2523	3494	4024	4973	7840	10833	Yes	275	260
Emery	1851	1851	2184	2792	3697	4292	5245	9840	14760	Yes	275	260
Airborne	711	1020	1557	2179	3112	3499	4078	8156	11376	No	250	250

BEST COPY AVAILABLE

ORDER OF CAB DATED JUNE 26, 1974

Order 74-6-117

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board at its office in Washington, D.C. on the 26th day of June, 1974

Docket 22387

INVESTIGATION OF AIR EXPRESS RATES

ORDER DENYING MOTION FOR STAY

By Order 74-5-23, entered in the above captioned proceeding, the Board found, *inter alia*, that the issue of the lawful future rates for air express service had been rendered moot by its decision in the *Express Service Investigation* (Order 73-12-36) to terminate REA's exemption authority to conduct air express service. In addition, the Board found that although the issue of whether it should attempt to retroactively redistribute between REA and the direct air carriers air express proceeds for prior periods was still ripe, the record and analyses developed by the parties on this issue was far from adequate for an informed judgment as to what the just, reasonable, and equitable divisions would be, or as to the Board's jurisdiction to prescribe such divisions. In this posture, the Board found it appropriate to request the interested parties to meet under the

chairmanship of the Director of the Bureau of Economics, and to endeavor to reach agreement "with respect to such matters as the detailed air express traffic and revenue data for calendar years 1971, 1972, and 1973; methods of evaluating the divisions made under the formula outstanding during the period April 1970 forward; and, . . . , an overall conclusion on the appropriate divisions for the period."[1]

REA has now filed a motion requesting that the Board stay Order 74-5-23 pending completion of judicial review.[2] Answers to the motion have been filed by the airlines participating in air express service ("Airlines"), Emery Air Freight Corporation (Emery), the Air Freight Forwarders Association (AFFA), and the Pet Industry Parties (Pet).[3]

Upon consideration of the motion and answers, the Board has determined for the reasons set forth below to deny the request. While REA apparently seeks a stay pending judicial review of the Board's order, it does not articulate the reasons why a stay is warranted, and we are unable to find that a stay is appropriate.

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1. Order 74-5-23 at 9.

2. REA's Motion also seeks a stay of the Board's decision in the *Express Service Investigation*, Docket 22388. By Order 74-6-118, the Board denied the Motion as applied to the *Service* proceeding.

3. On June 11, 1974, REA filed a reply to the answers of Emery and AFFA accompanied by a Motion For Leave To File An Otherwise Unauthorized Document. We will grant REA's motion.

The *Rates* proceeding order which REA now seeks to stay principally involves two distinct findings: first, that the issue of lawful future express rates is moot as a result of the decision to terminate REA's express monopoly; and second, that the existing record is inadequate for determination of the issue of retroactive redistribution of express revenues from prior periods and that further procedures are necessary. REA's motion completely fails to support any claim that either of these two findings will result in any irreparable injury to REA. Accordingly, we cannot find any basis for grant of the stay. In addition, the findings on the state of the record with respect to retroactive divisions do not constitute a final order of the Board on this issue and, therefore, are not ripe for judicial review. Hence, no basis for a stay *pendente lite* of this aspect of the order exists.

In our original order, we had sought to promote resolution of a number of issues underlying the retroactivity question through discussions between the interested parties. A meeting for this purpose had been scheduled for May 28, 1974, but was subsequently canceled at the suggestion of counsel for REA, who expressed the opinion that the meeting might not be productive in view of the pendency of the motion for stay. The Airlines in their answer took note of the cancellation of the meeting and suggested that rather than proceed with a meeting in accordance with the procedure outlined in Order 74-5-23, the Board first direct the parties to file briefs directed to the jurisdictional issue, and to consider the remaining issues only if the Board decides that it has jurisdiction.

We do not agree. There are several different resolutions that can be made of the retroactive redistribution issue regardless of the ultimate finding on the jurisdiction issue. Accordingly, for the foregoing reasons as well as the reasons expressed in Order 74-5-23, we will direct a rescheduling of the meeting in accordance with the procedures outlined in our previous order. The procedural dates will be determined by the Bureau Director.

ACCORDINGLY, IT IS ORDERED THAT:

1. REA's motion to stay of Order 74-5-23 be and it hereby is denied.

2. The ordering paragraphs of Order 74-5-23 be amended to read as follows:

"1. An informal conference be convened by the Director, Bureau of Economics, for the purpose of assembling factual material and attempting to reach agreement on the divisions of revenues pursuant to operations conducted under Agreements CAB 12866 and CAB 17935, as amended, as set forth in Order 74-5-23;

"2. At the termination of the conference by the Director, he shall forthwith file with the Board a report, accompanied by such stipulations as have been agreed upon by parties to the CAB agreements cited in paragraph one; and

Order of CAB Dated June 26, 1974

"3. If the parties to the above-listed CAB agreements cannot reach agreement on a stipulation of the divisions of revenue prior to the termination of the conference, the Director shall establish a procedural timetable for the filing by the parties with the Board of briefs and reply briefs addressed to the issues discussed in Order 74-5-23."

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

ORDER OF CAB DATED MAY 6, 1974

Order 74-5-23

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 6th day of May, 1974

Docket 22387

INVESTIGATION OF AIR EXPRESS RATES

O R D E R

This investigation was instituted by Order 70-7-109, July 23, 1970, to determine the lawfulness of the air express rates and the divisions of such rates and charges as between REA and the direct air carriers. At the same time, in a companion order,[1] we instituted the *Express Service Investigation,* Docket 22388, to explore, among other things, the future role of express or priority cargo service in air transportation and whether the existing concept of an air express agreement between the direct air carriers and an express company should be maintained.

1. Order 70-7-110. That order also deferred action on an amendment of the air express agreement between REA and the airlines which provided, *inter alia,* for new divisions of rates.

The Board has now, in Order 73-12-36, issued December 7, 1973, in the *Service Investigation,* authorized REA to operate as a domestic air freight forwarder, ordered the termination of REA's exemption authority to conduct air express service, and indicated that separate rates for expedited freight should be established[2] independently, by direct air carriers and air freight forwarders, rather than pursuant to agreements. In the light of that decision the instant *Air Express Rates Investigation* has been rendered moot in most respects. Because of the change in REA's mode of operation foreshadowed by our decision that it shall henceforth be an air freight forwarder rather than maintain its air express monopoly, no useful purpose would be served by our passing on the lawfulness of air express rates or attempting to resolve the disagreement between REA and the direct air carriers concerning the amounts to be paid over to the latter from revenues to be received under lawful prospective rates for express.

There remains, however, the question whether the Board should attempt to redistribute air express proceeds between the REA and the direct air carriers on a retrospective basis. This matter was within the scope of the hearing conducted by Administrative Law Judge Milton H. Shapiro, his Initial Decision, and our Order 72-7-15 undertaking review. Briefs have been filed and oral argument conducted, and the question was submitted for decision. However, as discussed more fully below,

2. Subject, of course, to the normal rate procedures involving review and possible investigation and suspensions. The order also disapproved the agreements covering air express services, rates and divisions. Express operations will continue for a "wind-up" period through July 31, 1974. Order 74-5-25.

we are not satisfied with (1) the analyses made by the parties concerning the Board's power to order a retroactive adjustment of the revenue divisions heretofore made by REA and the airlines or (2) the state of the record on REA and airline costs and revenues, and we are uncertain at this time whether, under all the circumstances, it would be in the public interest for the Board to exercise its discretion (assuming our jurisdiction) and attempt to redistribute the air express revenues. We do know, however, that there are major gaps in the data necessary to an informed judgment as to what the just, reasonable and equitable divisions would be, and that we have serious doubts with respect to the jurisdiction question which were not resolved by the parties' presentations.

REA contends that it has been denied its fair share of air express revenues in the past and argues that the Board can and should require an adjustment of these revenues for the past period beginning April 9, 1970, the date of REA's Petition and Complaint seeking reformation of the agreement and relief with respect to the revenue allocation reflected in the existing agreement.[3] Its argument is based on section 1002(h) of the

3. See Orders 70-7-110, 70-8-48 and 71-2-68. The Board originally dismissed REA's pleading since the reform and relief requested were the subject of the broader ranging *Express Service* and *Express Rates* cases, but when the carrier raised the issue of the legal effect of dismissal prejudicing its positions with respect to the date of any retroactive action under section 1002(h) of the Act, we reinstated the Petition and Complaint for the limited purpose of preserving our legal option to grant relief retroactive to the April 9, 1970, filing date, and consolidated that limited reinstatement with the instant investigation. The Board also announced that it refrained from taking any position on its power to grant such relief or the need for the relief, stating that it intended only to preserve such legal option should the Board decide to exercise it under proper circumstances.

Federal Aviation Act, which provides that when the Board prescribes just, reasonable, and equitable divisions of joint rates between the air carriers parties thereto it may require the adjustment of divisions between such air carriers from the date of the filing of a complaint or such later date as it finds just, reasonable and equitable.[4] REA claims that, under a proper division formula,[5] the airlines owe it over $1 million a month from April 9, 1970, forward, and that hence retroactive adjustment is needed to restore to REA its rightful entitlement.

At the threshold, the airlines have challenged the Board's jurisdiction to make retroactive adjustments of the divisions. They take the position that (1) while the Board can prescribe divisions prospectively through its power to condition approval of REA-airline agreements under section 412 of the Act, it

4. Section 1002(h) reads as follows:

> "Whenever, after notice and hearing, upon complaint or upon its own initiative, the Board is of the opinion that the divisions of joint rates, fares, or charges for air transportation are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the air carriers or foreign air carriers parties thereto, the Board shall prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers. The Board may require the adjustment of divisions between such air carriers from the date of filing the complaint or entry of order of investigation, or such other date subsequent thereto as the Board finds to be just, reasonable, and equitable."

5. Under the formula proposed by REA, airline divisions from air express are to bear the same relationship to airline air express costs as airline freight revenues bear to airline freight costs and the airline costs are to be computed on the basis of by-product costing.

cannot alter the agreements themselves[6] and (2) the Board lacks the power to prescribe divisions of revenues between REA and the airlines pursuant to section 1002(h), since express rates are not "joint rates" between REA and the airlines. They assert that joint rates may exist only between connecting carriers operating through routes *(i.e.,* airlines) and not between indirect air carriers and direct air carriers. The airlines state that REA does not operate "through routes" in air transporation, but only pick-up and delivery services, which are terminal services rather than line-haul or through route services.

In his Initial Decision Judge Shapiro did not reach the jurisdictional question under section 1002(h). Contemplating divisions for the future, he determined, in the then existing circumstances, that jurisdiction is conferred by section 412. That section of the Act allows the Board to approve or disapprove agreements between REA and the airlines and has been the vehicle for Board control of REA-airline relationships, including the method of dividing revenues, since the inception of the air express service. In the Judge's view, although the power to prescribe rate levels does not coincide with the power to prescribe divisions, once the rate levels are prescribed according to the costs of the carriers for air express, the parties could proceed, as in the past, to negotiate an agreement with respect to divisions to reflect the prescribed rates, and the Board can offer the parties the choice of Board approval if they conform to the

6. The carriers argue that if the parties to an agreement do not accept a condition the Board can disapprove the agreement, but not re-write it. Withholding approval of an agreement because of a deficiency would not here serve to change the distribution of express revenues for past periods.

conditions relating to divisions, or of disapproval if they fail to accept them. As to the retroactive adjustment issue, Judge Shapiro held that the rates and divisions he found reasonable showed that rather than there having been an overpayment to the airlines by REA from the proceeds of the air express revenues, the airlines had been underpaid. He found that the evidence did not support REA's contention that it is entitled to reimbursement for overpayments to airlines under existing divisions; that the airlines had made no claim for retroactive payment or alterations of the divisions, because of their view that neither Section 412 nor section 1002(h) grants authority to make retroactive adjustments; and that in all the circumstances no such adjustment was required. Accordingly, he found that there was no need to require retroactive adjustments of the divisions as a condition of approval of any REA-airline agreement to be reached regarding air express rates.[7]

As the Board currently views the matter, a major difficulty with the conclusion of the Administrative Law Judge is that the existing record does not appear to contain sufficient factual

7. In the light of the Board's decision in the *Express Service Investigation*, its power under section 412 to attach conditions to approval of the REA-airline agreement is no longer available as a means of prescribing divisions as a practical matter (absent consensus), since we are terminating the agreement in any event. Whatever the merits of conditioning approvals of agreements having future applicability on acceptance of prescriptions of divisions of revenues for past periods, the sanction of disapproval is lost where the agreement is not of a continuing nature, and we have no basis *directly* to reform an agreement between the parties. As Judge Shapiro correctly stated, under section 412 the Board is empowered to offer the parties a choice of approval if conditions are accepted or disapproval if they are refused, *cf. McManus v. C.A.B.*, 286 F.2d 414 (2d Cir., 1961).

information to permit us to conclude whether or not the existing revenue divisions, which could extend over a period as long as from April 1970 to 1974, are equitable. Although Judge Shapiro exercised a great deal of patience and persistence in attempting to determine the costs incurred by REA and the airlines, this task proved to be what he called "a prickly and elusive challenge." This was especially true so far as REA's financial results and operating statistics were concerned.

The problem stems in part from the fact that REA does not report on a recurrent (or even sporadic) basis any detail for its air express revenues, expenses and investment, nor such basic data as air express shipments, pieces and pounds, separately from such information for its surface express operations, much less on a more refined basis which would for example differentiate between system and domestic air express, or general commodity-rated and specific commodity-rated traffic.[8] Apparently, it also keeps its books on a system basis only, although air express is handled by a separate operating division of the company. Quite obviously, this history and practice of aggregate accounting and reporting both emphasizes the need for accurate allocations and makes the allocations more difficult to accomplish and to assess. When this deficiency was coupled with a fundamental revision of REA's system of accounts, effective July 1, 1970, the result was to render it extremely

8. The general commodity-rated traffic and the specific commodity-rated traffic are somewhat different in terms of volume, weight and prices per shipment, and weight per piece. See Initial Decision, Appendix J. The ALJ's costs were based on those for the general commodity-rated traffic, since marketing considerations would normally have a greater impact on the SCR's than on the GCR's.

difficult, if not impossible, to compare data for this first half of 1970 with data for the second half of that year, or to reconcile the data for the two halves of the year with the carrier's report to the Interstate Commerce Commission for calendar 1970, much less to make dependable comparisons with earlier years or projections to later years. Yet, REA was insistent that 1970 was the only feasible base period, since it had made two cost studies during that year which it deemed crucial to its allocation of costs. REA further asserts that, because of a number of variable factors, the studies could not be applied to 1969 data to develop cost allocations for that prior period (which had been designed earlier as the base year), and that even the costs REA itself had developed for 1969 were merely the product of what it characterizes as a "meaningless mathematical exercise." In that posture, and because of "the quality of the evidence actually furnished at the hearing" (I.D. p. 12), the Judge determined, in effect, to accept 1970 as the base year. However, it must be noted that the variables which were asserted by REA to make its costing inapplicable to 1969 data would appear to make equally questionable the application of its methodology to later periods.

Moreover, as indicated in the initial decision, the evidence presented at the hearing was not of the highest quality, to say the least. The exhibits were revised and recast on various occasions, not only to alter findings from the studies, but also to change fundamental statistics, such as number of shipments, and the result is a morass of seemingly conflicting figures. The problem is greatly aggravated by the absence of basic data for traffic and revenues subsequent to the hearing in this case. Judge

Shapiro directed REA to furnish monthly reports of air express traffic data until the Board's final decision in this investigation. In July 1971 REA requested permission to be relieved of this requirement. The request was denied by the Judge, but nevertheless REA unilaterally discontinued submitting the reports. Whatever the other difficulties of determining the proper divisions for years subsequent to 1970, the continued absence of basic information needed to allocate costs would make the task impossible.

Within the limits of the data the Administrative Law Judge has made cost findings for 1969 and 1970 which satisfied him that the airlines, rather than REA, had been underpaid and that REA had not proven that it was entitled to reimbursement for overpaying the airlines under the divisions. REA has challenged these findings, alleging that the Initial Decision contained errors involving over $26 million of claimed costs denied to it and almost $36 million of airline costs mistakenly allowed. While a preliminary review indicates that at least $22 million of claimed errors respecting REA costs are unsubstantiated[9] and that most,

9. REA has claimed "inflation" of $14.5 million but, quite apart from the fact that this item has no bearing on 1970 costs, the record support will not bear scrutiny. The primary bases for the claim are (1) its two forecast 15% payroll increases, predicated on asserted increases in that amount in the railroad industry, plus (2) a projection for economic inflation, footed on an overall forecast in the Survey of Current Business. But REA stated on brief to the Board that it had not paid its union employees increased wages since June 1970 and a national forecast is too speculative a basis to apply to the costs of any particular company. Further, there is no reason to believe that REA experienced inflation any more severe than the airlines with whom the air express revenues are to be divided.

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if not all, of REA's theories pertaining to the airlines' express costs are invalid,[10] the Board is unwilling to undertake an in-

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The second major "error" asserted was the disallowance of $7 million in return and taxes. However, this figure rests on the theory that a particular amount of money—here $3.5 million—is required to attract capital. Neither the theory nor the amount is adequately supported. As a means of reaching the sum in question, REA applied a claimed 15% capital to a *constructed* investment which would produce the result. This is a totally unacceptable approach. We will not inflate investment to make up for losses incurred prior to the institution of this investigation, nor attempt to provide a return on investment covering the cost of capital for REA's entire system, nor provide capital directly, as opposed to a return element affording the means for attracting capital—and the return element is not intended to make up for operating inefficiencies, failure to adjust costs to revenue, or lack of receptivity to service needs and customer requirements. See Tr. 515-517.

The remaining items are questionable. REA's posture on these rest on such factors as allocations based on unsupported judgment which are inconsistent with statements in tariff justifications on file with the Board; retroactive revisions of accounting for bad debts; insurance allocation ratios twice as high in one period as in another; and a mistaken view of the impact of a shipment count on the costs for general commodity-rated traffic. Problems of evidentiary support also inhere in the allocations of "other revenue" and accounting for value charges, C.O.D. fees, and other accessorial charges.

10. The first error ($3.74 million) attributed by REA to the initial decision was the use of a joint product rather than a by-product basis for allocating airline-costs as required by our decision in the *Domestic Passenger-Fare Investigation*, Docket 21866-7. But the ALJ did not misread our decision as asserted by REA. In contrast to our tentative view with respect to freight rates, we stated that we had no reason to believe that mail and express rates could not cover a fully allocated share of capacity and noncapacity costs. Our view has not been altered by the record in the instant investigation, which strongly suggests that REA's past problems with contracting shipment volumes were attributable to a reputation for poor service rather than to its prices. These prices remained advantageous competitively vis-a-vis air freight in the short-haul markets where the vast bulk of REA's traffic is carried. The repeated post-hearing filings for rate increases by REA are not inconsistent with a belief that express traffic is relatively price-inelastic. Moreover, for *division* purposes, costs should not be altered by price elasticity considerations: divisions

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depth review of REA's contentions with respect to 1970 in the absence of, at the least, more data for the remaining years which

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should be cost-based, and where the respective percentage shares of revenues are fixed in proportion to respective costs, inability to price at cost is irrelevant.

Second, the theory that the airlines' share of express revenues should have the same relationship to their express costs (based on by-product "costing") as their freight rates bear to freight costs was properly rejected by the ALJ. If it is true that the airlines cannot recover full costs from their freight operations (a question still to be determined in the *Domestic Air Freight Rate Investigation*, Docket 22859), it still does not follow that they should therefore lose money on express or should therefore be awarded a low share (assertedly $3.79 million less) of express revenues.

The next alleged error, labeled "priority and density," actually involves the theory and mechanics of capacity cost allocations: that is, the so-called weight versus space dispute, as well as the weighting factors used. REA states that over $14 million is at stake, but does not segregate the elements involved. Our tentative view is that the ALJ correctly used the space basis of allocation. That method requires the use of relative density as a conversion factor, and the ALJ properly preferred on-board density over dock-side density. He also properly followed precedent by using a priority weighting to allocate costs, since some costs are incurred because of reserving capacity in recognition of the priority agreement and the priority does result in some preference to express on some flights. *Cf. Nonpriority Mail Rate Case*, Order 70-4-9. However, we do not here pass on the validity of the priority weighting chosen. On the other hand, although REA made no evidentiary showing as to the proper cargo load-factor standard and failed to address itself to a passenger load-factor standard, it would appear that airline capacity costs are overstated for at least part of the division period if passenger load-factor standards developed in the *Passenger-Fare Case* are not applied.

Finally, REA makes a broadside attack on the ALJ's noncapacity costs, asserting a $14.3 million error. The difficulty with REA's presentation is that it relies very heavily on an unsubstantiated judgment that the airlines' cost of handling express traffic is one-sixth that of handling freight. The record shows that at many airports the airlines perform all handling functions, and that even where REA does play a significant role, there are countervailing influences such as the size of express pieces and the expense of runners.

As in the case of REA's costs, we shall not here explore the contentions of the parties with respect to airline express costs. We do note, however, two apparent problem areas: (1) the initial decision disallowed all reservations and sales expense, but some costs in this function do appear to be entailed, as the ALJ appears to have recognized, and (2) a straight-line approach to capacity cost allocations ignores the problem of taper in the short distances common for express shipments.

would be involved, and prior to resolving our heretofore stated reservations concerning jurisdiction.[11]

In this posture the Board deems it appropriate to request the interested parties to meet in an informal conference, with a view to reaching agreement with respect to such matters as the detailed air express traffic and revenue data for calendar years 1971, 1972, and 1973; methods of evaluating the divisions made under the formula outstanding during the period April 1970 forward; and, if possible, an overall conclusion on the appropriate divisions for the period. REA and the airlines collectively are requested to specify the amounts they respectively received under the air express rate levels in effect, during the periods April 9 - December 31, 1970, calendar year 1971, calendar year 1972, and calendar year 1973, bearing in mind not only the several rate increases but special payments or credits[12] and deficiencies.[13] We are hopeful that, with a full understanding of the difficulties, the conferees will be

11. Similarly, it would be inadvisable at this time to review the countervailing contentions of the airlines which claim REA's costs were overstated and their own costs understated by the ALJ; those of Bureau Counsel, who claims that both airline and REA costs were overstated by the ALJ; or those of the Air Freight Forwarder Association which urges that the ALJ has understated the costs and hence the rates for this competing service. Indeed, as stated above, the airlines have urged that we lack jurisdiction to revisit the past period divisions; and the freight forwarders have at most an extremely attenuated interest in a controversy limited to divisions.

12. *E.g.*, $1.5 million in 1970 and again in 1971 was credited and paid to REA notwithstanding other provisions of the division agreement.

13. It is our understanding that REA may have deferred payment of some $7 million to the airlines as of the end of 1973.

constrained to resolve their own differences and present a stipulation to the Board. If, however, a consensus cannot be reached, then the parties are requested to file briefs with the Board. These briefs are to be addressed to (1) whether the Board has jurisdiction over retroactive adjustments of the divisions of air express revenues, (2) whether assuming jurisdiction, the Board should exercise its discretion to require such adjustments,[14] (3) whether further procedures are necessary, short of final decision by the Board, and (4) what divisions should be established and the basis therefor.

ACCORDINGLY, IT IS ORDERED THAT:

1. An informal conference shall be convened within thirty day from the date of this order, to be presided over by the Director, Bureau of Economics, for the purpose of assembling factual material and attempting to reach agreement on the divisions of revenues pursuant to operations conducted under Agreements CAB 12866 and CAB 17935, as amended, as discussed above;

2. At the termination of the conference by its chairman, he shall forthwith file with the Board a report, accompanied by such stipulations as have been agreed upon by parties to the above-cited CAB Agreements; and

14. In this connection the parties should address themselves to (a) whether REA has the burden of proof to establish that the divisions under investigation are unlawful and (b) assuming that the answer to the foregoing is in the affirmative, whether the investigation should be terminated without further proceedings on the ground that REA has not sustained its burden.

Order of CAB Dated May 6, 1974

3. If the parties to the above-cited CAB Agreements have not agreed upon a stipulation of the divisions of revenues prior to the termination of the conference, they may file with the Board within fifteen days of such termination date, briefs addressed to the issues as described above.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

(SEAL)

SUPPLEMENTAL ORDER OF CAB DATED MAY 6, 1974

Order 74-5-25

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 6th day of May, 1974

Docket 22388

EXPRESS SERVICE INVESTIGATION

SUPPLEMENTAL OPINION AND ORDER

BY THE BOARD:

In Order 73-12-36 the Board determined to (1) disapprove the agreements among the airlines *inter se* and between the airlines and REA providing for air express service; (2) terminate REA's exemption authority to act as the exclusive indirect carrier for air express; and (3) award REA nationwide air freight forwarder authority and give REA six months to make the switch from air express to air freight forwarder service. The Board also found that the scheduled air carriers were under an obligation to offer highly expedited air freight service.

REA is the only party to seek reconsideration of Order 73-12-36. REA's petition for reconsideration is supported by the National Small Shipments Traffic Conference,[1] and opposed by all of the airlines that are parties to the air express agreements, the Air Freight Forwarders Association ("AFFA"), and Emery Air Freight.

REA has also filed a "motion for extension" that "requests the Board to permit air express to continue until January 31, 1975, so that the express partners may be afforded additional time for negotiations looking towards continuation of the air express system." Twenty-four of the 28 airlines participating in the air express system support REA's motion,[2] as does the National Small Shipments Traffic Conference, . United Air Lines, AFFA and Emery oppose it.[3]

The Board has determined to deny REA's petition for reconsideration and motion for extension. However, for reasons explained hereafter we shall delay the implementation of our decision to terminate the air express arrangement until August 1, 1974.

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1. We will grant the NSTC's motion for permission to file its reply late.

2. The four airlines that did not join in that answer are Delta, North Central, Southern and United.

3. REA's motion for extension and the various answers in support of, or in opposition to, the motion are accompanied by motions for leave to file otherwise unauthorized documents. The motions for leave to file otherwise unauthorized documents shall be granted, except for the motion filed on April 16 by the Brotherhood of Railway and Airline Clerks (See, *infra*, n. 22).

REA's Pleadings

REA's petition for reconsideration and motion for extension overlap in many respects. Neither takes issue with the Board's decision to grant REA domestic airfreight forwarder authority (REA in fact has long sought such authority) nor in terms seeks reconsideration of our decision to end air express. Rather, both purport to urge no more than that the termination date of air express be extended, with the petition for reconsideration also asking that REA be given additional authority in the interim period. In point of fact, however, REA's petition for reconsideration, and to a lesser extent, REA's motion for extension, contend that Order 73-12-36 is in error in a host of respects.

Taken together, REA's two pleadings present three basic contentions:

First, that the record shows that air express will continue to be a viable arrangement given appropriate action by the Board, and that the continuation of air express would be in the public interest.

Second, that circumstances arising since the close of the record in this proceeding further evidence air express's continued viability and its importance to the public.

Third, that even if the Board persists in its determination to end air express service (and REA's position as the exclusive

ground agent for air express), the termination date should be extended by at least 18 months, and perhaps considerably longer, and REA should be accorded dual air express-air freight forwarder authority in the interim.

Each of those three arguments refers to the claimed importance of air express's priority rights to air cargo space, to REA's broad geographic and commodity coverage, and to action the Board should take to enable REA and the air express system to return to financial health. It is to those issues that we now turn.

Priority Service

By joint agreement between all U. S. certificated route carriers and REA, REA is the only indirect air carrier that is accorded priority treatment.[4] We found that notwithstanding this arrangement, air express generally is not faster than air freight forwarder service and is often slower; that the priority rights of air express service only rarely have any effect; and that to the extent that extra-quick transportation and priority rights are useful to shippers, they can best be provided by airline tariffs so providing, without being tied, as they are now, to door-to-door air express service offered solely through REA. REA not surprisingly disagrees. REA claims that the priority service that air express offers is important to shippers, and that it is necessary to set back the termination date of air express at least

4. The agreement provides, however, that the airlines are required to give priority only to a "normal" amount of air express traffic.

18 months, and perhaps indefinitely, in order to assure that shippers continue to have priority service available.[5] In part REA's claims in this respect are based on views previously heard, considered and addressed by the Board. And while REA also raises arguments not advanced earlier, none merit reconsideration of Order 73-12-36.

REA argues that Order 73-12-36 is inconsistent because the Order finds little value in air express's priority feature but at the same time determines that airlines are under an obligation to offer highly expedited air freight service. We perceive no inconsistency. The record shows that a priorty air cargo system that enabled a shipper to purchase extra-quick service would be valuable to some shippers (albeit a relatively small number). We accordingly found that airlines are under an obligation to file tariffs providing for such service.

That is not inconsistent with our finding regarding the significant value of the priority rights of air express for the reason that even with such priority rights, air express is not particularly fast. Air express–with its priority rights–is generally able to deliver a shipment no faster than a forwarder can using non-priority air freight services.[6] The new service contemplated

5. REA also argues, at least implicitly, that because of the importance of air express's priority service, air express should not be ended at all.

6. REA claims one of the air express rules by which the airlines jointly divide up the air express business is a cause of this paradox. REA's point, apparently, is that we should have approved the continuation of air express, while conditioning our approval on the elimination of that rule. We discuss this general consideration *infra*, p. 13.

in the Order, on the other hand, will assure truly fast deliveries, in large part because it will be a system that will benefit from the competitive efforts both of the direct air carriers and of the many forwarders who have made it their business to achieve the fastest deliveries that direct air carrier operations permit.

REA next argues that recent circumstances specifically the ongoing fuel shortage--require that air express service be continued at least for the duration of that shortage. REA's theory apparently is that capacity reductions stemming from the shortage have already and will continue to substantially increase the likelihood that any given air freight shipment will be delayed by reason of insufficient cargo space. Air express shipments will not be delayed, the theory goes, because of air express's priority rights. Thus shippers who need prompt deliveries will benefit by extending air express's life for the duration of the shortage. REA offers no factual support for its position, however, and reports on file with the Board fail to establish a dearth of cargo capacity stemming from the fuel shortage.[7]

Moreover, if it be assumed that the fuel shortage will ultimately result in cargo demand outstripping cargo capacity, the appropriate course is not to attempt to prolong REA's

7. Thus in 100 of REA's top markets (see REA Ex-209) air cargo load factors — that is, percent of available air cargo space filled by air express, air freight, and mail — during the three-month period November and December 1973, and January 1974, averaged about 37%, up only about five points from the same period last year. These figures are compiled from service segment data reported to the Board by the airlines. (January 1974 data are the last currently available.)

monopoly over priority rights to cargo space. Rather, it is to ensure that the airlines offer priority service to all. For if limitations on airline capacity stemming from the fuel shortage were in the months or years ahead ultimately to make it difficult to obtain cargo space, it would plainly be contrary to the public interest to perpetuate the present arrangement, in which those shippers unable to accept the delays inherent in such circumstances would have to deal with REA because of REA's exclusive right to priority treatment.

Geographic Coverage

REA argues that air freight forwarders will not be able to match the geographic coverage now provided by air express.[8] REA also claims that even if the Board remains of the view that the forwarders have the wherewithal to expand their coverage, termination of air express should nevertheless be delayed in order to determine if the air freight forwarders will in fact expand the geographic scope of their operations sufficiently, and in order to give the forwarders the time to effectuate the changes in their operations that such expansion requires.

Upon consideration of the pleadings, the Board has determined that no error has been shown in the findings and conclusions made in Order 73-12-36 concerning the geographic coverage of air express and the forwarders' abilities and intentions.

8. We note, however, that REA's authorization as an indirect carrier is not being ended, but rather being changed from air express ground agent to air freight forwarder.

We note, at the outset that, as discussed in Order 73-12-36, REAs historic broad geographic coverage is a relic of the past, and that even if air express were to continue, the future would inevitably bring retrenchment in its scope of operations. No pleadings dispute these findings, and no party, including REA, has pointed us to new circumstances that would call these findings into question.[9]

In any event, and apart from the foregoing considerations, deferral of the date at which our authorization of air express ends would almost surely serve merely to delay still further the geographic expansion of air freight forwarder service. Our understanding of air freight forwarder economics convinces us that the forwarders are unlikely to take the risks inherent in substantially expanding the geographic scope of their operations as long as air express is in operation. The combination of thin markets (essentially all markets in which relatively large amounts of air cargo move are already served by forwarders), established REA customers, and the substantial level of nonline-haul services performed for REA by the airlines at most of the country's airports,[10] present market entry difficulties that could

9. REA suggests that the withdrawal of Santa Fe Airfreight and Domestic Air Express from air freight forwarding undercuts the Board's conclusion that the forwarder industry will be able to fill voids created by the withdrawal of REA from many markets. However, neither forwarder played a large or crucial role in the nation's air freight system, and we do not consider their departure material to this case. Moreover, air freight forwarders with nationwide systems, such as Emery, remain willing and able to fill such service voids, and we note that eleven long-haul motor carriers (many of which are nationwide companies) have recently filed for renewal of their air freight forwarder authority.

10. The airlines perform all ground services (receiving and delivery of over-the-counter shipments, routing of shipments, etc.) for air express shipments at about 85% of the nation's airports: See Order 73-12-36, at 24.

too easily dissuade forwarders from undertaking the necessary investments.

As we said in Order 73-12-36, irrespective of the action which the Board takes here some uncertainties are inevitable in the days ahead for air cargo service to small communities. But we remain of the view that the effectuation of Order 73-12-36 will redound to the benefit of the country's small communities as well as to the nation as a whole.[11] It should also be pointed that REA, as an air freight forwarder, will be able to offer priority handling at all of its present outlets. However, REA will no longer be the *exclusive* agent for priority cargo handling.

11. Similar considerations apply in respect to commodity coverage. In fact, the record is even clearer that the airlines and the forwarders will be fully able and willing to efficiently handle all of the commodities that now move on air express. REA claims that transporting some kinds of cargo presents difficult operational problems, referring particularly to the transport of live animals at a time when capacity has been cut because of the fuel shortage. But REA adds nothing beyond that already considered by the Board in Order 73-12-36 and above at p. 5 with the exception of a reference to a finding of a Congressional Committee (as reported in a newspaper article) that the Board and other agencies should "monitor" domestic animal shipments. The Congressional document cited indirectly by REA is a report of the House Committee on Government Operations, House Rept. No. 93-746, "Problems in Air Shipment of Domestic Animals," 93rd Cong., 1st Sess. (1973). As indicated, REA refers to the report as supporting its claim that air express should be continued in order to assure proper treatment of live animals being transported by air. In fact, however, the Report states that animals shipped by air express apparently often fare worse than animals shipped via air freight, that there are delays in the shipment of animals moving by air express, and that it appears that "REA in many instances is not equipped to handle animal shipments." Moreover, the Report specifically proposes that *REA's* handling of animal traffic "be monitored": Report at pp. 9-11, 18.

Relative rate levels of air express and air freight

REA claims that a decision in the *Rates* case[12] is needed to provide a comparision between air express rates and the rates offered by alternative services, and that the Board cannot reasonably take action ordering the end of air express until the conclusion of the *Rates* case.

The Board does not share REA's views. To begin with, as discussed in our opinion in the *Rates* case, the question of lawful express rates for the future is now moot by reason of the Board's decision in this proceeding to terminate the air express arrangement, and, accordingly, has not been considered in the *Rates* proceeding by the Board.[13]

Moreover, relatively low express rates, standing alone, cannot be the basis for perpetuating the air express system (even assuming that it could in fact be perpetuated). The Board recognizes that in many instances air express rates for small-package, short-haul shipments are less than air freight rates. However, as we stated in Order 73-12-36, this factor does not

12. Investigation of Air Express Rates, Docket 22387.

13. We note that in any event it is evident that the record in the *Rates* case could not provide a meaningful comparison between express and other freight rates. For, as Order 74-5-23 establishes, the record in that proceeding is woefully deficient, and, largely because of REA's failure to comply with evidence requests, does not contain basic information needed for the comparison that REA now insists upon. In this connection, AFFA, in its answer to REA's petition, argues that the *Rates* case should be abandoned because the record is stale. REA has moved for leave to file an otherwise unauthorized reply to AFFA's argument, in which REA strongly opposes abandonment of the *Rates* case. The airlines have moved for leave to file an otherwise unauthorized answer in opposition to REA's reply. We shall grant the motions of REA and the airlines.

outweigh other important public interest considerations that point to the termination of the current air express arrangement.

We also note that in recent years air express rates have been substantially increased a number of times.[14] One result of these increases is that in many instances it is now less expensive to ship even the smallest package on an airport-to-airport basis via the airfreight services of the airlines, and in some instances, the forwarders. (More than 20% of all express shipments were airport-to-airport shipments.)[15]

Finally, we cannot accept REA's argument that the Board should wait and see what rates the airlines and forwarders will publish for priority service before terminating air express. First, as previously discussed, REA's relatively low rates are not sufficient reason, in and of themselves, for perpetuating the air express system. Second, even apart from the Board's power to control rates, there is no basis for REA's suggestion that the rates for the new priority service will be unreasonably high. In fact, as noted in Order 73-12-36, it is the Board's view that competition for priority shipments among the direct air carriers

14. In the past few years alone there have been numerous and substantial increases in air express rates. In fact, since January 1, 1974, REA has increased its general commodity rates by 10% and certain special commodity rates (and related minimum charges) far more than 10%. The total additional revenue derived from these rate increases has accrued almost exclusively to REA, and not to its express partner, the airlines.

15. Air express service has always been a door-to-door service under a single rate which includes pickup and delivery service. Air express customers preferring to ship on an airport-to-airport basis (to avoid the delays inherent in pickup and delivery services, for instance) must nonetheless pay the full rate.

and all indirect air carriers, including REA, will result in an optimum balance of price and service. Third, and as also previously discussed, an extension of the life of the air express arrangement would hamper the institution of the new, and what we believe to be, superior, priority service.

Air Express's Viability

As detailed in Part V of Order 73-12-36: (1) air express is a joint arrangement that hinges on the maintenance of an agreement between two parties (REA, on the one hand, and, on the other, the airlines as a group) whose interests have long been divergent and are becoming ever more so, with the result that air express service remains in chronic danger of being interrupted or ended; (2) while the Board has sufficient authority to compel the airlines to provide line-haul services for REA under an arrangement that would resemble the present air express system in certain respects, the Board could not insure that the airlines would continue to perform ground services on behalf of REA that are an integral and important part of the air express arrangement; (3) REA, upon which the air express system depends, is in serious financial trouble which could only be alleviated, if at all, by a substantial increase in air express traffic volume; and (4) the kind of traffic volume increase REA needs could only occur if REA were granted expanded authority, but that such authority would have a detrimental impact on the public interest and, in any case, would not work.

As we understand the thrust of REA's two pleadings insofar as they deal with this aspect of Order 73-12-36, REA is arguing

that the Board could and should have taken steps to increase the chance of air express's continued viability by imposing various requirements, all beneficial to REA, on the airlines; that, as a result of current developments, there is a greater chance that REA and the airlines can work out their differences if given an extra eight months to do so; and that since determinations to be made in the *Rates* case will substantially affect REA's continued viability, it would be error on our part not to delay termination of air express until a final order issues in the *Rates* case.

We turn first to REA's argument that the Board's earlier approval of the air express agreements created "block bargaining power" on the part of the airlines; that the airlines–utilizing that power–have discriminated against REA; that the Board should have acted to prevent that discriminatory treatment; that if the Board had in fact done so it would have gone far toward returning REA and the air express toward viability; and that by not doing so the Board has acted contrary to antitrust policy.

We cannot conclude that REA's claims in this respect require reconsideration of Order 73-12-36. The air express agreements are plainly anticompetitive, and have the effect of eliminating competition between airlines and excluding air freight forwarders from various types of markets.[16] As we have

16. REA takes issues with the Board's characterization of air express as a monopoly. In our view, however, REA's arguments do not warrant our reconsidering our position in this respect. First, as touched on above, REA's unique arrangement with the airlines goes far toward assuring that air freight forwarders will be precluded from serving the country's smaller air cargo markets. Second, as we also touched on earlier, of the many indirect air carriers only REA (as air express's sole ground agent) has a claim to priority

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elsewhere discussed, the air express agreements do not produce counter-balancing public benefits, but rather stand in the way of the establishment of an improved air cargo system. REA nonetheless argues that notwithstanding the foregoing, Order 73-12-36 runs afoul of the antitrust laws by failing to order the continuation of the arrangement, and that as part of its "supervisory responsibility" the Board has to permit the air express arrangement to continue while taking steps to protect one of the willing participants to the agreement from its partners.[17] We cannot concur. Disapproval of the air express agreements is fully in keeping with the spirit of the antitrust laws. It is the perpetuation of them that would have been contrary to that spirit. And we are not aware of any supervisory responsibility imposed on us that requires us to attempt to aid an unhappy partner to an arrangement that has outlived its time.

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treatment by the airlines. The fact that this exclusive right (granted by all of the certificated route carriers acting jointly) does not seriously limit the air freight forwarders' ability to compete with air express shows only that an intended monopoly service has for various reasons not worked that way in practice. Even here, however, there is little doubt that some shippers distinguish between REA and other kinds of air freight service — however mistakenly — on the ground that air express has priority claim to cargo space. Moreover, REA's exclusive claim to priority service could become a matter of real significance if the fuel shortage were ultimately to result in cargo load factors climbing to high levels. Further, the existence of air express tends to prevent the institution by airlines of highly expedited service readily useable by air freight forwarders.

17. REA argues that the Board's decision to deny it independent tariff authority is inconsistent with views expressed by the Board in the Air Freight Forwarder Case, 9 CAB 473, 486 (1948). In that case the Board noted that a dispute between the airlines and REA could be eliminated if they agreed to participate in a system whereby REA would publish an express tariff based upon charges imposed on REA by the airlines for

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Moreover, our power to require the airlines to treat REA in any specified manner is in many respects limited. Thus the Board can not force any party to enter into a contractual relationship. In this regard, as discussed earlier, it is unlikely that the airlines and REA would be able to work out an arrangement continuing air express even if the arrangement were approved by the Board as is. Imposing the kinds of new conditions urged by REA would almost surely preclude continuation of air express by reason of the unwillingness of the airlines to become parties to an agreement so conditioned.

It is true that the Board probably could license REA to operate independently of an airline-REA agreement, and could compel the airlines to publish an air express tariff covering rates to REA. But as Order 73-12-36 points out, we are unaware of any authority by which we could require the airlines to continue to provide the many ground services that they presently perform

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their services to REA. The Board's views therein are not inconsistent with its decision in this proceeding. First, the Air Freight Forwarder Case supports the airlines' position which, as noted by the Board in Order 73-12-36, is that the airlines should be permitted to charge REA enough to cover their full costs. Second, Order 73-12-36 agrees with the Board's earlier conclusion that the Board does have the authority to permit REA to file its own tariff based upon rates charged REA by the airlines. However, the Board concluded in this proceeding that under existing circumstances a grant of the tariff authority REA seeks would not in fact serve to perpetuate the air express system in its present form. REA also has argued during the course of this case that, as an alternative to the beforementioned complementary tariff system, it should be permitted rate freedom in the sense that it would publish the only express tariff and the airlines would receive a division of the rates REA would charge to the public. It is in this sense that the Board stated at page 27 of its Opinion that " . . . it is understandable that the airlines have refused to enter into an arrangement whereby the rates to be charged for such shipments would be within the control of another company (REA) whose interests and cost structure vary considerably from those of the airlines."

on behalf of REA at so many of the nation's airports. REA points us to none and indeed does not dispute the concerns expressed on this point in Order 73-12-36.

REA's claims (in its motion for extension) that the June termination date for air express ordered by Order 73-12-36 ought to be extended eight months in order to permit the airlines and REA to work out their differences and arrive at a new agreement. REA bases its request on, among other things, newly instituted negoitiations between REA and the airlines, that, according to REA, show signs of possibly bearing fruit.

We cannot agree to this request for postponement. In the first place, the decision to end the air express arrangement was by no means predicated on the inability of the airlines and REA to come to an agreement. Our point was that any agreement between the two sides would necessarily be unstable due to the parties' divergent interests. Moreover, even that was but one of several concerns that led the Board to conclude that the air express agreements should be ordered ended.

Second, there is no basis for concluding that there is any real chance that REA and the airlines will be able to work out the fundamental differences between them.[18] All of the airlines participating in the air express arrangement filed a pleading supporting Order 73-12-36, and opposing REA's petition for reconsideration. Thereafter, 24 of those airlines appeared to reverse course and supported REA's motion for extension.

18. REA has so argued. See oral arg. tr. at 29-30.

United, for one, argues that that change in direction by the 24 direct carriers is prompted more by the hope that an extension would result in their collecting a greater percentage of the amounts due them by REA than by matters more directly related to the public interest. We need not speculate on the motivations of those 24 carriers, however, since the fact of the matter is that four airlines did not join in that response to REA's motion, thereby adhering to the position they espoused in the airlines' opposition to REA's petition for reconsideration. In 1973, those four carriers — Delta, North Central, Southern, and United — accounted for 35 percent of all air express traffic. Of the 500 or so points in the United States receiving certificated air service, about 100 receive such service only from one or more of those four carriers.[18a]

In these circumstances, we can only conclude that the possibility of continuing the air express arrangement in anything like its present form — that is, a consensual arrangement providing broad geographic coverage — has not been shown to be any less free from doubt than it was at the time of issuance of Order 73-12-36, or that this state of affairs is likely to change for the better by January or thereafter.

REA's other argument in respect to continuing air express' viability appears to be that REA's financial problems — which

18a. Ft. Wayne, Ind. is served only by Delta and United; Meridian, Miss., by Delta and Southern; and Flint, Lansing, Muskegon, and Saginaw/Bay City/Midland, Mich., by North Central and United. Each of approximately 90 other points are served only by one of the four carriers.

have been a major source of weakness in the air express system — could be greatly ameliorated if the division of air express revenues between REA and the airlines were appropriately adjusted in REA's favor. REA points out that this question of divisions is at issue in the *Rates* case and that accordingly the Board cannot reasonably make any determination about the viability of air express until the conclusion of that case.

We cannot agree, however, that delaying action here to await the final outcome of the *Rates* case would serve any purpose, much less benefit the public interest. To begin with, and as discussed in our accompanying *Rates* opinion, the record in the *Rates* case does not now permit a determination of reasonable divisions, and it is not completely clear that it will ever do so despite our order there.[19] Further, as discussed in Order 73-12-36 and concurred in by REA, in order for REA to attain financial health as the air express ground agent it would have to greatly increase its traffic volume. A change in divisions would not be enough to render air express viable[20] unless it were accompanied by extensive changes in REA's authority that would be neither feasible nor in the public interest.

The Mechanics of the Changeover

REA claims that it needs more than six months to change from air express ground agent to air freight forwarder. It points

19. Of course that case will in any event consider division questions only on a retrospective basis. Moreover, the authority of the Board to order divisions is itself contested.

20. As noted earlier (at n.14 above), REA's share of each dollar of air express revenue has been steadily increasing. Yet the carrier's financial health remains unsatisfactory.

to such matters as the need to instruct its employees in air freight rates and the need for specialized equipment, including containers, certain types of vehicles, and so forth. In our view, however, REA has utterly failed to show that the six months grace period granted to REA by Order 73-12-36 is insufficient. A prompt switch by REA from air express ground agent to air freight forwarder should present no undue difficulties. It is already an air freight forwarder in international markets. REA has long claimed it badly needs air freight forwarder authority, presumably on the basis of careful consideration by its management of how REA would conduct air freight forwarder operations. It has its many long standing customers. It appears that a very considerable portion of its buildings and equipment are suitable for air freight forwarder operations. And its management and employees are intimately familiar with the air cargo industry. Moreover REA provided no factual support that it needs more time.[21]

For reasons expressed earlier herein and in Order 73-12-36, the nation's shippers will be better served when air express is ended. For that reason prompt termination is in order. REA claims that it will suffer badly if it has to switch to air freight forwarder status on June 5.[22] However, in our view, even if that

21. While its pleadings are replete with generalized allegations in this respect, we are provided with no specific data that could lead us to conclude that we should reconsider the determination in Order 73-12-36 that six months is sufficient time for the changeover.

22. On April 16th the Brotherhood of Railway and Airline Clerks sought leave to file an answer in support of REA's motion for extension, arguing that termination of REA's air express authority would cost many of REA's employees their jobs. REA's petition for

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were the case, there has been no showing that REA would be in a materially different position after a deferral than it is now.[23]

In sum, the evidence is that a prompt termination of the air express system is in the public interest. However, the Board appreciates the complexity involved in setting up a new priority system for handling air freight. In this connection, we note that while the airlines have met for the purpose of establishing a priority system, they have not, as of this date, filed tariffs that would offer priority service by June 5, 1974. In order to give the carriers time to present the Board with a new system for priority handling of air freight and file the appropriate tariffs, the Board has decided to extend its approval of the air express agreements, and REA's exclusive express authority, through July 1, 1974.

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reconsideration also refers to the impact our decision would have on its employees, and the Board has, of course, taken this consideration into account as a public interest factor, but has found that the public interest will, on balance, be favored by the actions we have ordered. Moreover, it is our belief that since the air cargo industry will be strengthened by the termination of air express, the net impact on the industry's employees will be a favorable one. Further, BRAC's position is predicated on the view that the possibility exists that the present air express system can continue. However, we have concluded to the contrary. Since BRAC is not a party, and has not shown good cause for late filing, we shall deny its motion.

23. REA also claims that the airlines and forwarders, need substantially more than six months to adjust to the Board's decision to terminate air express. Again, REA provides no factual support for its claim and has otherwise failed to support its argument. In fact, the airlines and forwarders, speaking for themselves, dispute REA's contention, and further state that they will have no difficulty making whatever adjustments are required by the Board's order.

Our decision not to extend the termination date of air express as requested by REA to all intents and purposes moots REA's request for dual authority. Even apart from that, however, we would not grant the authority REA wishes. As discussed in Order 73-12-36, such dual authority would present a variety of problems, including the possibility of serious confusion on the part of the public. Moreover the grant to REA of dual authority would be a meaningless gesture since the airlines have made it more than plain that they would not continue to deal with REA as air express ground agent if REA obtained air freight forwarder authority.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petition for reconsideration and the motion for extension filed by REA Express, Inc., be and they hereby are denied;

2. The motion of the National Small Shipments Traffic Conference for leave to file an untimely reply to REA's petition for reconsideration be and it hereby is granted;

3. The motion of REA Express, Inc., for leave to file an otherwise unauthorized motion for extension, and the motions of the Air Freight Forwarders Association, Inc., Emery Air Freight, Inc., the National Small Shipments Traffic Conference, the participating airlines, and United Air Lines, for leave to file otherwise unauthorized answers to REA's motion for extension be and they hereby are granted;

Supplemental Order of CAB Dated May 6, 1974

4. The motion of REA Express, Inc., for leave to file an otherwise unauthorized reply to the answer of the Air Freight Forwarders Association to REA's petition for reconsideration, and the motion of the participating airlines for leave to file an answer to REA's reply, be and they hereby are granted;

5. Ordering paragraph "3" of Order 73-12-36 be and it hereby is modified to read as follows:

"3. That the exemption authority of REA Express, Inc., to conduct operations in air transportation initially granted by Order Serial Number 941, dated March 13, 1941, as amended (the most recent amendment authority being granted by exemption Order E-22273, dated June 4, 1965) be and it hereby is terminated on the date that REA commences air freight forwarder operations pursuant to an authorization issued in accordance with our decision herein, or on August 1, 1974, whichever date occurs first;"

6. Except to the extent granted herein, all motion, applications and requests involved herein be and they hereby are denied; and

7. This Order shall be served on all persons on whom Order 73-12-36 was served, and the Brotherhood of Railway and Airline Clerks.

TIMM, Chairman, GILLILLAND, Vice Chairman, and MINETTI, Member, concurred in the above opinion and order. WEST and O'MELIA, Members, did not take part in the decision.

EDWIN Z. HOLLAND

Secretary

(Seal)

CAB EXPRESS SERVICE INVESTIGATION DATED DECEMBER 7, 1973

73-12-36

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 22388

EXPRESS SERVICE INVESTIGATION

Decided: December 7, 1973

1. Agreements providing for air express service between REA Express, Inc., and participating scheduled airlines and among the participating airlines disapproved, and prior approvals withdrawn.

2. Exemption authority of REA Express, Inc., to conduct air express service terminated.

3. REA Express, Inc., awarded air freight forwarder authority.

4. Scheduled air carriers found to have obligation to offer priority service as part of their duty to provide adequate interstate and overseas air transportation.

OPINION

BY THE BOARD:

I. INTRODUCTION

This is a proceeding to explore the role of express service in air transportation. The crucial issue in the proceeding, from the start, has been what action the Board should take in respect to the indirect air carrier authority of REA Express, Inc., and the related agreements between the various airlines and REA.

Administrative Law Judge James S. Keith concluded, after presiding at a lengthy hearing on the matter, that express service in its present form serves a useful public purpose and should be maintained basically without change. In support thereof he found (1) that there are important differences between air express and other forms of air freight, *i.e.*, that air express is cheaper, faster, provides more comprehensive geographic and commodity coverage, and enjoys the exclusive benefit of priority treatment by the airlines; (2) that the present type of inter-airline agreement and the type of agreement between the airlines and REA are essential to the existence of air express service and should therefore be continued; and (3) that REA is the only qualified ground agency willing and able to enter into agreement with the airlines to provide air express service, and should therefore be continued as the exclusive indirect air carrier of express.

By Order 72-6-27, June 6, 1972, the Board exercised its right of discretionary review. Briefs were filed by Allied

American Bird Co. (Allied), Bureau of Operating Rights (BOR), REA Express, Inc. (REA) and Southern Pacific Air Freight, Inc. (SPAF). The Air Freight Forwarders Association (AFFA), Emery Air Freight Corporation (Emery), the National Industrial Traffic League (NITL), and the Participating Airlines (airlines) adopted their briefs to Judge Keith as their briefs to the Board.

The airlines generally agree with the findings and conclusions of Judge Keith.

REA agrees with Judge Keith's conclusions concerning the utility of air express and REA's role as the exclusive indirect carrier thereof. But it contends that the judge failed to take steps necessary to insure the continuation of REA and express service. REA claims that if the Board maintains the *status quo,* as recommended by the administrative law judge, it will not be able to continue to provide service in many markets. In order to avoid this result, it urges the Board to adopt three courses of action. First, the Board should award REA permanent authority as the exclusive indirect carrier of express. Second, it should reform the airline-REA agreement so as to (1) eliminate rules therein that require REA to divide up shipments among all available air carriers; (2) permit REA to offer the shipping public air express tariffs free of airline control; and (3) permit REA to consolidate and containerize air express traffic. Third, the Board should award REA air freight forwarder authority in addition to its exclusive air express authority. In this respect, REA maintains that it needs air freight forwarder authority in order to spread the costs of air express over a greater volume of business than air express is capable of generating.

The two shipper parties, NITL and Allied, agree that there is a need for air express service. NITL supports the findings and conclusions of the Initial Decision. Allied wants the Board to take steps to eliminate the threat of a discontinuance of air express service resulting from the inability of the airlines and REA to agree to terms.

BOR and AFFA urge the Board to cancel the air express agreements and to terminate REA's exemption. In their view: (1) there are no material distinctions between air express service and air freight service provided by the airlines directly or by the forwarders indirectly, and that accordingly, there is no basis for affording REA different regulatory treatment from the forwarders; (2) the present air express arrangement is otherwise contrary to the public interest. BOR and AFFA generally agree that there is a need for air freight services of a highly expedited character to handle freight involving life or death commodities, highly perishable products, or articles that must reach consignees particularly rapidly for various reasons. To accommodate this type of traffic, BOR recommends that the direct air carriers file tariff rates and rules providing for whatever special handling may be required. Such tariffs would be available not only to the air freight forwarders and the general public, but also to REA, which should be given air freight forwarding authority under Part 296 of the Economic Regulations.[1]

1. Emery and SPAF generally agree with the BOR position. However, Emery would limit the high priority tariff to "humanitarian commodities" and those critical to the national defense. SPAF is willing to accept BOR's proposal, but, if the concept of air express is maintained, SPAF urges that a limited number of forwarders now offering an express type service also be granted air express authority.

Oral argument has been heard, and the case stands submitted for decision.

II. SUMMARY

Earlier Board decisions established air express as a separate service, apart from all other air cargo services, and granted REA a monopoly to conduct that service. For some time, however, REA's operations have been on the brink of extinction. In the first place, the very existence of express service today is wholly dependent upon a 1970 court decree requiring REA and the airlines to continue service. Not only have the parties been unable to agree on the terms of express service, but their long-smoldering disputes threaten to erupt again in the future, thus jeopardizing the express scheme. Secondly, REA is financially impoverished and, by its own statement, does not want to continue service under the present regime.

The real issue, therefore, is not whether to continue the separate service known as air express, but whether to attempt to change it — or to replace it entirely. Neither choice is inviting. The first alternative requires strengthening REA's monopoly position at the expense of the airlines and forwarders and, quite likely, shippers as well. The second alternative is to let air express become part of the general air cargo business and, by licensing REA as a forwarder, allow REA and other forwarders to serve all or most of this market, probably at somewhat higher rates. Either alternative entails some risks and uncertainties about the future. As we see it, the latter choice is the best available to us.

REA seeks to expand its present authority because it cannot continue air express service unless it returns to profitability. To accomplish this, REA insists that it not only be allowed to maintain its stranglehold over air express, but also be given an air freight forwarder's license. But the Board cannot find that REA's possession of dual air express-air freight forwarder authority would be in the public interest. On the contrary, it would place REA in a position to dominate the entire indirect air carrier industry, with consequent adverse impact on the development of air freight. It would cause serious confusion for REA's customers as to nature of the services any given shipments would receive. And it would divert REA's energies away from small shipment, small community, service.

In any event, REA's partners in express service, the airlines, have served notice that they would refuse to enter into an air express agreement if REA acquires dual authority. So this option is not available as a practical matter.

In addition, REA wants the Board to reform its express agreement with the airlines so that REA would have ratemaking powers free from airline veto. That request is neither feasible nor desirable; it would only breed a host of new problems. Again, independent rate authority would simply divert REA's energies away from small shipment, small community traffic. It would present insoluble regulatory problems since the data needed to evaluate proposed rate changes would not be available. And it would increase the likelihood of sudden disruption of service resulting from irreconcilable differences arising between the

airlines and REA. Finally, to the extent REA's proposal could be put into effect, the likelihood is high that the grant of independent ratemaking authority would not increase REA's traffic enough to make REA profitable again.

Because of these reasons, REA cannot be given the authority it seeks — unless the chance that it could thereby continue its separate express service is so vital that it outweighs all other considerations. That is not the case. For, as this nation's general air freight industry has grown and developed, many of air express' historical advantages have withered away. No longer is air express faster than general air freight service. The priority status of air express shipments rarely has any impact, and in any event, shipper requirements for priority service can best be made by airline tariffs specifically intended to meet those needs. Finally, in terms of geographical and commodity coverage, few (if any) points, and no commodities, will go unserved as a result of the termination of air express. In sum, an end to air express will not deprive the public of any unique services.

This decision marks a change from the Board's 1948 conclusion that "the public interest requires the continuance of [REA's] air express service."[2] That finding, which was not meant

2. Air Freight Forwarder Case, 9 C.A.B. 473, 483. Even at that time, the airlines regarded the REA arrangement as temporary "until the airlines as a group were ready to take over all express operations." See National Air Freight Forwarding Corp. v. C.A.B., 197 F.2d 384, 388 (D.C. Cir. 1952). In 1955, without a full-fledged re-examination about whether an express service (separate from air freight) was still needed, the Board continued REA's authority on the ground that, at that time, "There is no substitute available • • •." Air Freight Forwarder Investigation, 21 C.A.B. 536, 564, 630. Of course, even after REA's express authority terminates, the airlines remain free at all times to provide express service themselves.

to be binding for all time, reflected the infant state of the new air freight industry. Until 1944, all air cargo was carried as air express. The first airline began carrying air freight (as distinct from air express) that year; and the first forwarders were authorized to begin operations in 1948. Standing then at the beginning of a new era, the Board could not know that twenty-five years hence REA would be nearly destitute, that the newly-authorized forwarders would be offering fast, comprehensive service, that REA would be unwilling to continue nationwide express service except with drastically expanded authority, and that the likelihood would be low that REA could continue its existing service even were that new authority to be granted. As a result of these developments, the Board no longer has the option to continue express service in the format contemplated in 1948, and consequently, cannot reach the same conclusion.

In contemplating air express' demise, the Board is aware that this service offers the lowest nongovernmental rates[3] to many small-package shippers. This would be a compelling reason to continue air express if that were possible. Indeed, the Board has given serious thought to inviting the parties to continue operations under the present contractual arrangements. Even if REA were willing, however, it would be forced to curtail many of the present services which have justified keeping air express as a separate service. And once REA is reduced to paralleling those services which airlines (and forwarders) already provide, the airlines' continued willingness to support REA as

3. U.S. Postal Service rates are often lower than those of air express. See p. 23, n. 30, *infra*.

both a partner and a competitor is open to doubt. Moreover, although REA might somehow muddle through for awhile, it would only be postponing the inevitable collapse. For, under any arrangement satisfactory to the airlines, REA cannot cure its financial plight. And, if REA gains basic advantages it seeks, it cannot avoid rancorous disputes with the airlines. Whether or not the arrangement is revised, express service will remain in chronic danger of sudden suspension.

The time has come to lay a solid groundwork for a dependable small-package service. That is not possible so long as REA's express service continues to exist. For, while REA continues its monopoly, and offers its low rates, air freight forwarders cannot economically afford to expand into REA's special markets and offer competitive small-package service. Once air express markets are opened to all, including REA, small-package shippers will have the chance to gain the benefit of a truly dependable service. And they will be released from the constant threat that the only available service will suddenly disappear.

In the long run, we believe, this result will best serve both the public and REA. Once REA becomes an air freight forwarder instead of an express carrier, it will be freed of artificial constraints and have a genuine opportunity to rehabilitate its finances. Moreover, once the express monopoly ends, both airlines and freight forwarders will be encouraged to fill any service voids and to achieve, as a result of competition, a more optimum balance of price and service.[4]

4. Except to the extent modified herein, we adopt as our own the findings and conclusions of Judge Keith.

III. BACKGROUND

Air express is one of the three types of federally regulated air-cargo[5] service available to the shipping public today.[6] It is a service of the scheduled air carriers[7] and REA, and is provided pursuant to two interairline agreements. The first (Agreement CAB 12866) organizes the airlines into a collective unit for the purpose of dealing with the matter of air express service and with REA (the "ground agent") through an authorized Air Express Negotiating Committee. The second (Agreement CAB 17935) joins the airlines and REA (the chosen ground agent) into a type of partnership for the provision of air express service.[8] Under the Air Express Agreement, it is the responsibility of the airlines to provide airport-to-airport service for a "normal" amount of air express on a priority basis, and it is REA's obligation to provide various ground and administrative services. However, at the airports where REA has no airport field offices (approximately 85 percent of the air carrier airports in the country, the air carriers perform all ground services (such as transfers between aircraft, routing of shipments, receiving and delivery over-the-counter shipments,

5. We will here use the term "air cargo" to include both air express and air freight.

6. The others are airline air freight and air freight forwarder air freight.

7. At the time of hearing, 31 U.S. carriers (including two helicopter operators and three all-cargo carriers) and two foreign-flag carriers (Air Canada and Air France) were parties to the air express agreement with REA.

8. The agreement between the airlines, on the one hand, and REA, on the other, will sometimes hereafter be referred to as the "Air Express Agreement."

and paperwork).[9] The airlines estimate that 28 percent of all air express shipment handlings occur at these airports.

Air express offers broad geographic and commodity coverage, and a relatively simple rate structure that is designed to be particularly attractive for small shipments moving relatively short distances. While door-to-door service is provided without extra charge, a substantial percentage of air express shipments move on an airport-to-airport basis because of the delays inherent in pickup and delivery service. Because the rate structure for air express is constructed on a weight and mileage block basis, air express rates do not take account of market density considerations or the rates of competing carriers. Air express rates are generally not affected by the nature of the commodity shipped.

The last Air Express Agreement to receive Board approval was entered into in 1964 and expired on June 30, 1969. After a delay due to a change in ownership of REA,[10] negotiations between the airlines and REA on a new agreement were

9. The Air Express Agreement contemplates, however, that REA will perform the billing and claims handling and also the paperwork for shipments picked up or delivered or received at REA's non-airport terminals.

10. For nearly 40 years REA was owned and controlled by the nation's railroads. However in 1969 the railroads sold their controlling interest to REA Holding Corporation, a newly-organized company owned by management officials and outside investment firms. At the time of hearing, the holding company owned 99.2% of REA's stock and the fractional balance was owned by two railroads. The railroads have an option to buy back 19.8% of REA's stock by July 1974. The holding company also owns all of the stock in The Express Company, Inc., which has recently been awarded international air freight forwarder authority. See Application of the Express Company, Inc., For International Air Freight Forwarder Authority, Orders 72-10-60 and 72-12-43.

undertaken,[11] but proved fruitless. Finally, on April 4, 1970, REA filed a Petition and Complaint with the Board (Docket 22096) indicating that the differences between it and the airlines were so basic that they could not be satisfactorily resolved without Board intervention. The airlines answered by stating that the termination of the air express agreement was preferable in their view to an agreement that would constitute a surrender to REA's demands. The instant investigation was instituted on July 23, 1970, partly in response to the parties' inability to settle their differences informally. However the dispute continued unabated thereafter. REA refused an airline offer to extend the agreement beyond July 31, 1970 (the expiration date of the last agreed upon extension), and the airlines responded by embargoing all air express shipments, effective midnight on that date. At this point various shipper groups sought and obtained court orders that required the airlines and REA to continue air express operations pending a determination in this proceeding and a contemporaneous investigation of air express rates in Docket 22397.[11a]

The parties are now operating under an interim agreement, scheduled to expire 60 days after the date of the final orders in both cases. It is likely, therefore, that but for the court orders and these investigations, there would have been no interim agreement, and, hence, no air express service.

Turning to REA, it operates as both an ICC-regulated surface express carrier, and as the airlines' express service

11. The parties agreed to extensions of the 1964 agreement during the talks.

11a. Investigation of Air Express Rates (hereafter the "Rates" case or proceeding).

ground agent. It has run into trouble in both areas. Its surface traffic has declined from about 47 million shipments in 1967 to 15 million shipments in 1970. Since REA's farflung organization depends on a large volume of traffic for its viability, the decline in surface traffic has put heavy pressure on REA's air express functions. But REA's air express traffic, while not suffering continuing declines comparable to its surface traffic, has not been increasing rapidly either, in marked contrast to the air freight traffic of air freight forwarders.

Express and Air Freight Traffic,[12] 1960-1970
(Thousands of tons)

Calendar Year	REA Express	Direct Air Carriers	Air Freight Forwarders
1970	122	2,145	640
1969	134	2,049	512
1968 1	136	1,830	391
1967	121	1,564	295
1966	118	1,442	239
1965	110	1,266	218
1964	96	1,004	163
1963	84	827	128
1962	82	769	110
1961	73	N.A.	98
1960	70	522	N.A.
Percentage Increase Five Years 1966-1970	3%	49%	168%

12. Air parcel post figures for the 1960-1970 period are difficult to utilize because of definitional changes in the 1960's. However, for three years 1968-1970, air parcel post shipments increased from about 123,000 tons to about 185,000 tons.

Largely as a consequence of the foregoing, REA's financial position has deteriorated drastically.[13] It has survived in recent years only by selling off capital assets amounting to $48,000,000, and at the present time its saleable assets are virtually exhausted.

IV. AIR EXPRESS WILL FILL NO UNIQUE SERVICE NEEDS

Notwithstanding REA's perilous condition, the Administrative Law Judge recommended that air express be continued because he thought that it provided a unique service. Insofar as the Law Judge viewed air express as irreplaceable from the standpoint of service convenience, we cannot agree. In the early days of air freight, air express did possess many service advantages over conventional air freight. Many of those advantages no longer exist; others are likely to disappear soon; and the remainder can be achieved through other means.

A. Speed of delivery and priority treatment.

REA and its supporters have long claimed that air express service is unique in that: (1) it is faster than other forms of air cargo transportation, and (2) its priority rights insure that a shipment will travel on the earliest flight out. In fact, however, air express generally is not faster than air freight forwarder service, and is often slower; the priority rights of air express

13. REA's net worth in 1970 was *minus* $26,000,000. Its last profitable year was 1965, when it earned about $1,000,000. Since then (through 1972), it has lost about $68,000,000.

shipments only rarely have any effect; and to the extent that extra-quick transportation and priority rights are useful to shippers, they can best be provided by airline tariffs so providing, without being tied, as they are now, to door-to-door air express service offered solely through REA.

Air express is not faster. The weight of the evidence of record establishes that air express is not unique in providing expeditious service to the public; other forms of air freight provide service that is as fast, or faster than, regular express service. Indeed, even the airlines, a partner and strong supporter of continuing the express arrangement, concede this point and for good reason. Shippers use air transportation to save time, and the forwarders, among others, appreciate that in their competitive environment they must provide fast and efficient service in order to survive. Consequently, the forwarders have developed services and operational techniques that are comparable, and in some instances superior, to express service: (a) both types of service provide for the shipment to be picked up and placed aboard aircraft the same day, and to be delivered at destination the "next day,"[14] when airline schedules reasonably permit, otherwise the second day; (b) forwarders, like REA, tender shipments to the airlines throughout the day to achieve maximum speed of delivery; (c) express service does not provide for faster ground handling; and (d) as we shall discuss shortly, the priority feature of express generally has no significant effect upon the movement of air cargo.

14. A shipment that is delivered within 48 hours of the time that it had been picked up is considered to be a "next-day delivery" in industry usage. See Initial Decision at 39.

Elapsed time surveys conducted by the parties support the conclusion that air express is simply not faster than air freight. While these surveys have a number of failings,[15] they nevertheless do indicate that in the nation's major markets, at least, REA's services do not produce an elapsed time distinguishable from other air freight services. The results of these surveys are set forth at 39-41 of Judge Keith's Initial Decision. Summarized here, the surveys showed that the majority of air express and air freight shipments received next-day service, and nearly all shipments received at least second-day service. Indeed, Emery's survey showed that Emery provides faster door-to-door service than REA; and REA's own survey, using REA's own standards, corroborates Emery's.[16]

Priority treatment rarely has any impact. The air express arrangement has long provided that the airlines will give space priority on aircraft to express shipments. In 1948, when air cargo space was very limited, the Board found that priority was a distinguishing characteristic of air express. But circumstances have changed. While the amount of cargo moving by air has increased dramatically, the amount of cargo space operated by

15. See Initial Decision at pp. 39 and 48.

16. REA's figures indicate that both REA and Emery achieved identical first-day performance (45.8%). However, at the hearing it was established that Emery's performance was even better since a number of shipments, not reported by REA, were also delivered on the first day. Tr. 2670. More specifically, REA's survey indicates that Emery achieved comparable first-day service, and faster second-day service *(i.e.,* 92.3% of Emery's shipments were delivered by the end of the second day, as compared to 87.5% for air express).

the airlines has increased even faster.[17] Thus the problem today is not finding cargo capacity, but filling it.[18] A survey conducted

17. As illustrated by the table below, the percentage of available cargo capacity that now goes unused is high:

UNUSED CARGO CAPACITY, Scheduled Domestic Service

(Fiscal Year 1973)

All carriers in scheduled domestic service	70.5%
Trunks and Pan American	72.5
All Cargo Operations	39.9
Local Service Carriers	74.7

In large part this is due to the vastly increased cargo capacity of present-day aircraft, as listed below:

Post 1955* Combination Aircraft		Pre-1955* Combination Aircraft	
Aircraft Type	Cargo Capacity (Cubic Feet)	Aircraft Type	Cargo Capacity (Cubic Feet)
B-747	6,250	DC-7	750
L-1011/DC-10	3,000	DC-6	350
DC-8/B-707	1,350	Constellation	450
B-727-200	850	DC-4	250
DC-9	600	DC-3	85

* The Board's last formal review of air express was in 1955.

18. See Motor Carrier-Air Freight Forwarder Investigation, Opinion on Remand, 69-4-100, pp. 11-12; Household Goods Air Freight Forwarder Investigation, 72-7-33, pp. 4-5.

by the airlines, and submitted into evidence in this proceeding, shows the effect of the plethora of cargo capacity on the value of the priority aspects of the air express. Of the flights surveyed, only one out of every 58 (1.7%) departed without sufficient space to accommodate the cargo tendered for the flight.[19]

Thus the utility of the priority provisions in the air express agreements is very limited, as even REA conceded elsewhere.[20] Moreover, as we now discuss, shipper requirements for priority service can best be met by airline tariffs specifically intended to meet those needs.

High Priority Tariff. The evidence before us shows that notwithstanding the considerations discussed above, highly expedited service that gets priority treatment is useful to various shippers, and that they use air express to satisfy these requirements. Upon consideration of the record herein, we find ourselves in agreement with those shippers that there is a need, albeit a very limited one, for service of that nature. We have further concluded that such a need can and should be met through the publication of high-priority tariffs by the various direct air carriers. We discuss this matter more fully below,[21] and only note here that as a result of this determination shippers

19. Of 37,500 flights surveyed, 650 left cargo behind because of full cargo holds. Noting that the survey was conducted during a non-peak traffic period, the Law Judge intimated that more cargo might be denied boarding in holiday and other peak seasons (I.D. 33, 48, 52). On this record, however, it would be speculation to assume that the percentage of flights departing with cargo holds full during peak periods is materially different than the figures resulting from the airlines' survey.

20. See Initial Decision, Rates Proceeding, at page 38.

21. At pages 38-39.

interested in priority status for their shipments will be able to get it from both the direct air carriers and air freight forwarders, and REA's monopoly over such service will be ended.

B. Geographic Coverage.

REA, like the direct air carriers and the air freight forwarders, does the vast bulk of its business in a relatively few large markets.[22] Nonetheless, while REA is under no mandate to serve any given point, REA has long provided broader geographic coverage than the direct air carriers or any air freight forwarder. Previous Board decisions approving the air express system were based, in part, on this factor.

On the other side of the coin, as we weigh the evidence of record, few (if any) points would go unserved as a result of the termination of air express service. To begin with, the direct air carriers offer air freight service, including pickup and delivery service, to and from virtually every air carrier airport city, and its environs, in the United States.[23]

The larger forwarders also offer service to virtually every air carrier airport city, and serve about as many cities with exclusive

22. For example, REA's own exhibits show that 6 cities produced 56% of its total air express shipments, and only 4% of its combined offices produced 82% of its total air express shipments. Similarly, they show that 87.4% of REA's gross O&D revenues come from only 6.5% of the thousands of offices it claims it has. See Exhs. REA-T-8, p. 4; REA-202, p. 2; REA-205 and REA-212. See also Exhs. AFFA-R-11.

23. As a general rule, direct and indirect carriers may file tariffs providing for pickup and delivery service within twenty-five miles of an airport, or the city limits of a certificated point, whichever is larger. The vast preponderance of the U.S. Population lives and works within 25 miles of the nation's 500 air carrier airports.

stations[24] as does REA: 66 for Emery, 56 for Airborne, and 69 for REA. When the forwarders' intermodal service is added to the picture, their systems are comparable to REA's. For example, two of the larger forwarders offer coordinated air-truck service to approximately 17,800 points beyond airport terminal areas.[25] In fact, the larger forwarders now have authority from the ICC that permits them to provide pickup and delivery service at any point in the U.S., provided only that some part of the movement is by air. Accordingly, the forwarders have ample regulatory authority to offer nationwide geographic coverage.

Secondly, it is our judgment, based upon the evidence of record and the history of the air freight forwarder industry, that many (if not all) gaps in geographic coverage resulting from a termination of air express will be quickly filled by freight forwarder expansion. The record is replete with evidence of air freight forwarder plans to that effect.[26] And air cargo industry economics make it most likely that those plans will bear fruit.

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24. REA operates only 69 airport field offices with its own employees. Of this total, 37 are operated exclusively by air express employees, and 32 are operated by REA employees engaged in both surface and air express activities. As indicated previously, airline employees, rather than REA employees, perform the airport terminal functions normally associated with air express shipments at all other airports.

25. Exhs. EAF-T-2 and AFFA-100, 101.

26. For example, Emery states that if REA discontinues operations, it will bridge resulting gaps in air freight service. Thus it testified:

> "Emery is prepared to assume [the responsibility in] its present tariff to provide [transportation for] all of the commodities that are

(Cont'd)

But even if forwarders cannot expand as expected, they can surely match REA at those communities which Rea could continue to serve in the future. For REA's historic broad geographic coverage is clearly a relic of the past. Not only is REA already consolidating its service, but it must soon retrench if it is to survive. As REA concedes, it will pull out of many small communities unless it can improve its profitability by means of expanded authority.[27] Elsewhere we explain why REA cannot be granted the new authority it seeks and that, in any event, that authority would not cure its financial woes. Suffice it here to say that no community will lose air cargo service solely because of our action.

(Cont'd)

> presently found in the current air express tariff, and further to add all of the points that are not presently in Emery's air freight forwarding tariff in order that there can be a continuation of the same type, scope, commodity and points of service as is presently contained in REA's air express activities. We believe that the air carriers themselves would file some sort of a complementing tariff similar to their air freight tariff that would provide the underlying air carriers with the same sort of service to be held out to the public and to be used by air freight forwarders in the event of demise of REA.
>
> "Such would be an airport-to-airport tariff, . . . there would not be any gap in continuation of the type of air express service in the event that REA disappears." EAF Brief 19-20; Tr. 2663-2664.

Similarly, Airborne states that if the Board permits it to offer express-type service, such as we are proposing to do herein, it will convert its 141 destination agencies to outbound generating points. This, of course, is in addition to its 56 airport offices. It further anticipates that in one year it would set up a total of 400 generating points for both conventional air freight and high priority traffic. AFFA also states that other forwarders represented by it contemplate similar expansion in their service if they are authorized to offer an express-type service. See, *e.g.*, Tr. 2261-2262; Exh. AFFA-LR-16.

27. For the same reasons, REA will reduce the number of commodities for which it offers service.

C. Commodity Coverage

As discussed above, termination of air express would not reduce the geographic coverage of air cargo. Similarly, no commodity presently moving by air will be precluded from continuing to do so as a result of our decision herein.

REA presently carries only about 18 more items than do the airlines and the larger forwarders. (Thus for all but a fraction of the millions of shipments moving in air transportation, REA's commodity coverage is coextensive with that of the forwarders and the airlines.) Moreover not even these few commodities will lose service as a result of the ending of air express.[28] REA, as an air freight forwarder, will be fully authorized to continue to handle all of the commodities, and provide all of the services, it presently offers. In any event the record shows that even were REA to turn away from such business, it would be handled by the direct air carriers and other air freight forwarders.

By way of example, we consider the carriage of live animals and birds, and security services (items singled out for special emphasis by the administrative law judge). We appreciate that in the past many shippers of animals and birds were dependent upon air express, since REA provided the only extensive door-to-door service for these commodities. As to the future, however, it is apparent that other air cargo services should fully meet the needs of these shippers. The airlines have recently included live animals and birds in their pickup and delivery

28. As noted above, REA will be forced to reduce the number of commodities for which it offers service if the present air express regime is continued.

service. And the forwarders have stated that they plan to provide similar services of their own. (The airlines and forwarders are demonstrably fit to handle such shipments and have done so in the past.) Additionally, there is no evidence in the record that there will be any harm of grievous delay to birds and animals if they are shipped via air freight rather than air express. Shippers of birds, for example, have stated that they now use air freight service to transport birds to quarantine areas, and use air express for further distribution. In the future these shippers should be able to use either the forwarders, including REA, or the airlines for the entire operation.

Similarly, there will be no injurious hiatus in the transportation of valuables or other commodities covered by REA's security services. For one thing, Emery has demonstrated that it would provide this service if the express category of freight is abolished. For another, the air freight industry has reached a stage of development where specialized forwarders are now providing security service comparable to REA's.[29]

In sum, as we read the evidence before us, no community will go unserved as a result of the termination of air express, and no commodity will be precluded from moving by air. The record also shows that transit time for REA shipments does not vary materially from that of shipments handled by air freight

29. See, *e.g.*, Orders 69-3-31, 69-5-50, and 71-7-53. The last-named order refers to Wells Fargo Air Express (WFAX), which states in this proceeding that it will specialize in express-type transportation of currency, coin, gold and silver bullion, securities, jewels and other valuables. Tr. 1711, Exh. WFAX-T. Its exhibits suggest that its service will be similar to, and in some respects superior to, REA's. Furthermore, we note that another well-established security specialist, Brink's Inc., has recently applied for air freight forwarder authority, and indicates that it intends to provide extensive services similar to those offered by Wells Fargo. (Docket 25687)

forwarders, and that, in any event, highly expedited service by the direct air carriers is feasible and, indeed, is part of their duty to provide reasonable transportation.

In all these ways, in other words, cessation of air express service will have no material impact on the public.

V. THE PRESENT SYSTEM CANNOT BE MAINTAINED

In many markets air express offers lower rates for small-package shipments than do either the direct air carriers or the air freight forwarders.[30] This fact constitutes a compelling argument for continuing the service if such continuance were feasible. However, based upon the record in this proceeding and many

30. See Initial Decision of Administrative Law Judge Shapiro in the Rates case. Since the date of that decision air express and air freight rate levels have changed substantially. On an overall basis, both have increased. Comparisons of present air express rates (rounded to the nearest dollar) with the present and proposed priority mail rates are as follows:

Weights		300 miles	1,000 miles	1,800 miles
5 lbs.	air express	$12	$12	$12
	present postal	3	3	4
	proposed postal	3	3	4
15 lbs.	air express	12	13	16
	present postal	7	9	11
	proposed postal	6	8	9
25 lbs.	air express	12	16	20
	present postal	12	14	18
	proposed postal	10	12	15

Postal service is not available for some shipments, however, because of commodity and size restrictions, lack of pick-up service, etc.

years of experience with the present arrangement, we are convinced that the basic realities of the situation offer no practicable way of retaining the present air express arrangement.

Air express is a joint arrangement that hinges on the maintenance of an agreement between two parties whose interests have long been divergent and are becoming ever more so. Indeed, air express is currently being operated solely by virtue of a court order preventing termination of the underlying agreement pending the conclusion of this proceeding. The airlines, on the one hand, and REA, on the other, have been unable to agree even on the basic question of what share of air express revenues each should get. Disagreement here hinges not only on what cost accounting theories should be used to determine each party's share, but also on the accuracy of raw cost and traffic figures.[31]

Moreover, ongoing changes in the industry are adding to the sources of friction between REA and the airlines. The airlines are becoming increasingly commited to the air freight business and not surprisingly have exhibited a strong interest in restricting the attractiveness of air express, in which revenues have to be split with REA, to traffic holding little interest for the airlines: small shipments moving door-to-door. REA, on the other hand, faced with loss of substantial volumes of traffic in its traditional markets as a result of changes in postal regulations and the growth and development of the air freight forwarder industry, has been demanding changes in its relationship with

31. See, *e.g.*, Judge Shapiro's Initial Decision in the Rates case, and the airlines' and REA's briefs to the Board in that proceeding.

the airlines, and in the air express rate structure, designed to permit air express to compete successfully for much of the traffic that is now moving by the airlines' air freight services.

While the Board can regulate aspects of air freight service, it would be difficult (if at all possible) for the Board to force the parties to consent to conduct air express operations under the present system when they cannot come to terms. It is probably true that the Board could license REA to operate independently of an airline-REA agreement, and could compel the airlines to publish an express service tariff covering rates to REA. But, absent an agreement between the parties, there is no way to insure that the airlines will be willing to continue performing all the ground services at those airports — 85 percent of the total — where REA has no airport field offices.[32] Consequently, no matter what the Board does in this proceeding, nationwide express service will remain in chronic danger of being interrupted or terminated as a result of eruptions of differences between the two sides.[33]

Further, the air express system depends upon REA's viability,[34] and REA is in deep financial trouble. Its liabilities far

32. Even at major airports where REA has field offices, the airlines perform important ground services for air express.

33. As noted earlier, the existing interim agreement terminates 60 days after the final order in this proceeding.

34. Judge Keith found that if air express is to be continued without substantial interruption of service, there are no alternatives beyond the utilization of REA as the ground agency for the airlines. We agree. Among other things, while all of the air freight forwarder parties are applicants for air express authority, none is willing to relinquish its air freight forwarder authority to enter into an arrangement with the airlines on the same basis as REA. See, in this regard, pages 31-32 *infra*.

exceed its assets. Its continued existence depends wholly upon the willingness of its creditors not to take advantage of their right to require REA's liquidation. REA has not turned a profit for years, and shows no prospects of doing so despite a major change in its operations. Rate increases would not be enough, as REA itself acknowledges.[35] The crux of the matter is that REA must increase its traffic volume substantially, either by somehow increasing its air express traffic, or by carrying traffic under other authority, in addition to its air express business. REA agrees and is here seeking expanded authority. For reasons we now discuss, however, the authority REA seeks would raise a host of problems, and more to the point, simply would not work.

VI. REA'S REQUEST FOR EXPANDED AUTHORITY

A. Independent Rate Authority

Under the present express agreements, while REA is the tariff agent for the airline parties in respect to the filing of air express tariffs with the Board, the rates embodied in those tariffs must have the approval of the airline parties. The result is an express service rate structure that has limited REA to relatively circumscribed roles in the air cargo industry. As mentioned earlier, under the existing air express rate structure, in general REA's service is attractive for small shipments needing door-to-door service. Conversely, shippers almost always find it more attractive to send relatively large shipments, including aggregations of shipments,[36] via direct air carrier or air freight

35. Oral argument at pp. 19-20; Tr. 920, 924-25.

36. See Investigation of Accumulation, Assembly and Distribution Rules, 12 CAB 337.

forwarder.[37] To all intents and purposes REA is thus precluded from carrying such shipments, except in markets so small that no direct air carrier or air freight forwarder serves them, and except with respect to highly unusual commodities *(e.g.,* gold bullion).[38]

Under the independent rate authority change that REA proposes, REA could, subject only to Board review, alter the express service rate structure by decreasing rates applicable to the large, longer-haul shipments in the nation's larger markets, and in respect to particular commodities that are now the bread-and-butter of air freight forwarders and the direct air carriers. That is in fact REA's intention. And we would agree that if REA is to quickly increase its traffic by the hundreds of thousands of shipments it needs to return to viability, it is that traffic in those markets it must seek.

However, a grant of the authority REA seeks would not in fact serve to perpetuate the air express system in its present form. The airlines' position is that they would not enter into an air express agreement with REA subject to a condition that

37. As REA notes, apart from differences in the air freight and air express rates structures regarding general commodities, many air freight shipments travel under low specific commodity rates.

38. Air express rates include pick-up and delivery service. Thus air express shippers who find it convenient or necessary to deliver their shipment to, or pick it up at, the airport, get no rate reduction. (Air freight rates, on the other hand, are usually made up of an airport-to-airport rate, plus additional charges for optional pick-up and delivery services.)

would give REA entirely independent tariff authority. We think their position is an entirely reasonable one. Air express is a joint arrangement of the airlines and REA. Both incur costs with every air express shipment. Under such circumstances it is understandable that the airlines have refused to enter into an arrangement whereby the rates to be charged for such shipments would be within the control of another company (REA) whose interests and cost structure vary considerably from those of the airlines.

While the airlines' position is not clear on this point, it appears that the airlines would be willing to lessen their veto power over air express rate changes if — but only if — the airlines could be assured that air express rates would in all cases be high enough to cover the airlines' fully-allocated costs (including profits) and that the airlines would receive a share of the revenues equal to those fully-allocated costs in respect to each shipment. However, a restriction of that nature in the independent rate authority REA proposes would have the practical effect of preventing REA from adopting rates attractive enough to gain the substantial extra traffic it needs to maintain the existing air express system.[39]

Even assuming that the airlines would enter into an air express agreement giving REA freedom to change air express rates, and further assuming that the rate changes would enable REA to attract significant amounts of new traffic, problems would still abound.

First, since the independent rate proposal presents the inherent difficulty of putting one joint venturer in a position to

39. REA concurs. See tr. 870-71.

establish rates without the concurrence of the other, it would virtually assure bitter and continuing disputes between the two parties upon whose cooperation air express service depends — REA and the airlines.

Second, the effectuation of REA's proposal would pose grave regulatory problems. The essence of REA's independent rate proposal is that it needs the flexibility to vary its rates on a market-by-market and commodity-by-commodity basis. (As mentioned earlier, with minor exception, air express rates currently vary solely with distance and weight.) Because of the nature of air express and of REA's operations, determinations of the reasonableness of air express rates even under the present simplified rate structure become an "Odyssey of cost accounting," as Judge Shapiro remarked in the *Rates* case, requiring cost and traffic data in extraordinary amounts and detail. If REA were in a position to file tariffs that, for competitive reasons, varied by market and commodity, even further detail would be required in order for the Board to assure that, among other things, the lower rates proposed would not burden other traffic. The records here and in the *Rates* case show conclusively that REA and the airlines would be unable to furnish the needed information.[40]

40. As we shall discuss in our forthcoming Rates opinion, the record in that case is woefully inadequate, in large part because REA simply was unable to supply considerable amounts of relevant data. Moreover, because of the nature of REA's operations, or because of its internal financial and traffic reporting systems, some of the data REA did supply was inaccurate. In this proceeding REA was unable to develop financial and traffic projections that went to the heart of its case. REA was able to produce other forecasts, but so many months late as to be unusable.

Third, REA's efforts to return to profitability by seeking the business of larger, longer-haul shipments in major markets would necessarily require REA's management to even further divert its attention from small communities and small-package service to larger shipments moving between metropolitan areas. Shippers now dependent on REA — *i.e.*, small-package shippers and those in some small communities — would thereby suffer a further deterioration in air express service.

Fourth, REA claims that it would use its rate setting powers to attract shipments now moving by surface means. But whatever REA's intentions, the realities of the air cargo business and REA's operations are otherwise.[41] It is inevitable that the results of REA's efforts to increase its traffic by rate changes would be the carriage by REA of substantial amounts of relatively heavy long-haul shipments that would otherwise have moved via the air freight services of the various air freight forwarders. This in turn would raise difficult questions about whether in many markets the forwarder industry's ability to continue to serve the public efficiently would be impaired.

B. Dual Air Express-Air Freight Forwarder Authority

Permitting REA to handle any given shipment under its air express authority when that seems most profitable, and under its forwarder authority when that best suited its corporate goals, would similarly give rise to many problems. And there would be no practical way of avoiding that result were we to grant REA air freight forwarder authority in addition to its express powers.

41. As REA's witness Nelson stated, REA needs to expand into the long-haul and high-density air freight markets. REA-T-9. See also, Ex. AFFA-200, 3-4.

First, it would plainly present problems for the forwarder industry's health. With dual authority, REA could offer a full range of rapid delivery services — including "priority" services — that could not be matched by any other forwarder. If this helped REA to dominate the entire indirect carrier industry, as it might, it would inevitably lessen competition among existing forwarders and, perhaps, sap the vitality of that group. Of course, that would thwart this agency's primary goal in licensing REA and the forwarders — namely, to promote the vigorous development of air freight.

Second, it appears that the existing air express arrangement depends heavily upon cross-subsidization between the various air express markets. The economics of air cargo transportation are such that, with dual authority, in many cases REA would use its air freight forwarder authority to carry traffic that is now moving by air express at a profit (typically, shipments moving in dense, heavily trafficked markets) while continuing to use its air express authority in the thin, unprofitable ones. Thus the dual authority REA seeks would reduce the extent to which the profitable air express traffic could cross-subsidize the unprofitable traffic. One result would be that shippers in small communities would have to pay higher air express rates without enjoying any compensating improvements in service.

Other concerns militate against dual authority. For example, the cost accounting difficulties the Board already faces when seeking to evaluate air express rates would get considerably worse. In addition, dual authority could cause serious public confusion among REA's customers as to (a) the

nature of the service any given shipment would be receiving, and (b) the proper rates to be charged for such service.[42] Finally, dual authority would inevitably divert REA's attention from small-package and small-community service for the same reason that, as discussed above, a grant of independent rate authority to REA would.

But we need not dwell on these matters since a grant to REA of the dual air express and air freight forwarder authority it seeks would be futile. Since continued air express service is dependent upon the airlines and REA entering into new air express agreements, and because of the airlines' justifiable concerns about the conflict of interest difficulties inherent in the dual authority REA seeks and the consequent impact on the airlines' ability to spread their air express costs over a reasonable volume of express traffic, they have served notice that they would not become parties to any express agreement if REA was awarded air freight forwarder authority.

VII. TERMINATION OF THE AIR EXPRESS AGREEMENTS AND AWARD OF AIR FREIGHT FORWARDER AUTHORITY TO REA

REA's monopoly control over air express has always been an anomaly in an air transport system enjoined to preserve

42. As noted by AFFA, the safeguards proposed by REA to avoid public confusion are woefully inadequate. In any event, the purported advantages to be gained by dual authority would be greatly diminished by bifurcated operations such as proposed by REA.

"[c]ompetition to the extent necessary * * *" (49 U.S.C. 1302). REA was originally licensed as the exclusive ground agent for air express on a temporary basis. It has been allowed to linger in that status because there was "no substitute available."[43] Now we have come to a time when REA's original sterling features have long since tarnished; and its continuance as the airline's exclusive ground agent for an express service promises more harm than good. In contrast, promising substitutes for the joint REA-airlines air express arrangement now exist in profusion. Whether we try to perpetuate the present system through some modified form of monopoly, or whether we open the door to the forces of competition, the methodology for expedited shipping of small packages must undergo a profound — and not entirely predictable — transformation. Recognizing that some uncertainties are thus inevitable, the Board prefers to trust in competition, rather than monopoly, as the agent of change. For our regulatory experience has always tended to show that the free play of competition has stimulated the development of air cargo.[44] That past history, we hope, will also prove to be prologue for the future here.

Accordingly, for the reasons we have set forth at length, we are terminating our approvals of the air express agreements, and are withdrawing REA's air express exemption authority. As we discuss below, we are concommitantly authorizing REA to operate as an air freight forwarder.

Because the public would be best served by enabling, to the extent that we can, shippers, REA, and the other elements of the

43 See footnote 2, p. 6, *supra*.

44 See Motor Carrier Investigation and Household Goods Investigation, *supra*.

air cargo industry to be able to plan for the forthcoming changes in the industry, we are delaying by a half-year the effective date of our action to terminate the air express arrangement, and shall approve interim air express agreements to the extent that they carry forward the terms of the present agreements and are marked to expire in conformance with our order herein.

As we stated earlier, we have concluded that now that REA will no longer be the exclusive indirect air carrier of air express shipments, the public interest would be served by the grant to REA of air freight forwarder authority. We have determined to make this grant notwithstanding REA's financial ill-health, and its present inability to function effectively as an indirect air carrier, because we believe that REA's prospects as an air freight forwarder vary considerably from its expectations as a party to what has become an unworkable air express arrangement. There is no guarantee that REA will continue to operate whatever action we might take. But its reformation into an air freight forwarder will have numerous advantages for it, as its management recognizes. It will be able to limit its business to the kinds of traffic, in the areas of the county, it can deal with most effectively. Its rate policies will no longer have to take into account airline partners whose interests vary so greatly from REA's. And the size, identity and breadth of coverage it developed as the airlines' ground agent for air express should stand it in good stead in its efforts to compete with other forwarders on equal terms.

REA holds operating rights issued by the Interstate Commerce Commission to haul general commodities, and it operates over-the-road service between a number of markets

over 500 miles apart. REA therefore comes within the Board's Long-Haul Motor Carrier Regulations,[45] which are set forth in Subpart I of section 296 of the Economic Regulations. Summarized here, Subpart I provides that the Board will approve an application if it appears (a) that the applicant is capable of performing the proposed air transportation and of conforming to law; (b) that the applicant will conscientiously promote cargo and will benefit air transportation; and (c) that the applicant's operations will not create a monopoly and thereby restrain competition or jeopardize another air carrier, or will otherwise be inconsistent with the public interest.

REA's application meets the regulatory criteria. It is a well-established indirect air carrier that has long been providing and promoting an air cargo service. Its history as such readily demonstrates that it will conform to the Act and the Board's Rules and Regulations and will conscientiously promote air freight. In fact, it has established in this proceeding that its future depends upon its ability to develop competitive air-oriented operations. REA's entry into forwarding will provide the type of public benefits contemplated by the Board's long-haul motor carrier policy. In this respect we believe that REA's entry will provide a wide range of services to a great many communities, since REA will now be able to offer conventional air freight in response to the public need to close the gap between cargo carried and available cargo space. Further, these benefits will not be offset by other important considerations such as the impact that its entry will have on other forwarders.

45 A "long-haul motor carrier" is defined as a motor carrier holding operating rights issued by the ICC to haul general commodities between any pair of points that are over 500 miles apart, or an affiliate of such a carrier.

While it is true that REA will enter the field in a strong position, and has the potential for diverting some traffic from existing forwarders, it does not appear that these factors require a denial of air freight forwarding authority, since, to the extent that REA does divert traffic from existing forwarders, this should be more than offset by the forwarders' ability to compete for small-package business previously monopolized by air express. In these circumstances, we are unable to conclude that REA's air forwarding operations will have an adverse impact on the forwarder industry.

Finally, we appreciate that all Subpart I air freight forwarder authorizations are scheduled to be reviewed by the Board shortly. The Board will determine at that time whether the long-haul motor carriers regulated by Subpart I have in fact been promoting air transportation during the periods of their authorization. However, we shall not require REA to participate in that review, since it has demonstrated at length in this proceeding that it will conscientiously promote air freight and that its authorization as an air freight forwarder is otherwise consistent with the public interest.

Accordingly, upon the establishment by REA that it is in compliance with the various technical requirements of Part 296, domestic freight forwarder authorization will issue, effective on the date of termination of REA's air express authority.

VIII. HIGH PRIORITY SERVICE

The nature of a very limited number of commodities is such that it is important they receive the fastest possible service, and

that they can be assured next-flight-out transportation.[46] Similarly, shippers of commodities that usually do not warrant such preferred treatment will occasionally desire extra-fast service and the assurance that their shipment will leave on the next flight out.

Air transportation is almost always the fastest possible way to ship goods. If a shipment cannot be gotten to its destination in time by air, the chances are very high that it cannot meet its deadline any other way. In our view this places a special responsibility on the nation's air carriers to provide a means whereby extra-fast transportation is made available.

We think that these considerations lead inescapably to the conclusion that, as part of the airlines' duty to provide reasonable transportation, they are under an obligation to offer highly expedited priority service under tariffs so providing.[47]

The airlines argue that the provision of such service would be impracticable since it would be difficult to give assurance that all shippers needing such service could have it anytime they wanted it, and because priority service requires coordination by a single ground agent. We disagree. The first contention amounts to an argument that the airlines will sometimes be deluged with traffic shipped under the priority tariff. But the

46. See, e.g., Tr. 2402; Exhs. AFFA-405, EAF-T-1, page 4.

47. We cannot conclude from the evidence herein that this obligation extends beyond airport-to-airport service. It is plain, however, that highly expedited door-to-door service will be offered by the forwarders and, perhaps, the direct air carriers, once the new airport-to-airport service is underway.

evidence of record suggests that the odds of that happening are extremely remote. And insofar as coordination among airlines is concerned, the record does not suggest that a single, nationwide ground agent is indispensible. Some inter-airline coordination will be necessary, however, and accordingly, we will be receptive to requests for inter-carrier discussions about this matter. In any event, we think such concerns are relevant to the nature of the tariff rules that should govern such traffic, and to what reasonable rate levels for such traffic should be, not to whether airlines can feasibly provide the service.

In view of the foregoing considerations and all the facts of record, it is found that:

1. Agreement CAB Number 12866, initially approved by Order E-13764, dated April 21, 1959, as amended (the most recent amendment being approved by Order 72-12-109, dated December 22, 1972) (a) is adverse to the public interest; (b) should accordingly be withdrawn effective upon the termination of the authorization described in paragraph 3 below; and (c) should be disapproved on the same date.

2. Agreement CAB Number 17935, initially approved by Order E-22271, dated June 4, 1965, as amended (the most recent amendment being approved by Order 72-7-5, dated July 3, 1972) (a) is adverse to the public interest; (b) should accordingly be withdrawn effective upon the termination of the authorization described in paragraph 3 below; and (c) should be disapproved on the same date.[48]

48. Agreement CAB Number 17935 expires by its own terms 60 days after final decision in Dockets 22387 and 22388. Since no final decision has been issued in Docket 22387, the agreement continues in effect.

3. The continuation of the exemption authority of REA Express, Inc. to conduct operations in air transportation initially granted by Order Serial Number 941, dated March 13, 1941, as amended (the most recent amendment of that authority being granted by exemption Order E-22273, dated June 4, 1965) (a) is not in the public interest; and (b) should accordingly be terminated on the date that REA commences air freight forwarder operations pursuant to an authorization issued in accordance with our decision herein, or 180 days from the service date of the Order in this proceeding, whichever date occurs first.

4. REA Express, Inc. (a) is capable of performing air freight forwarder operations authorized by Subpart I of Part 296 of the Board's Economic Regulations and of conforming to the Act and the regulations thereunder; (b) will conscientiously promote air cargo and will benefit air transportation; and (c) in its operations, alone or together with those of other air freight forwarders, will not create a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier, or otherwise be inconsistent with the public interest.

5. It is in the public interest to grant REA Express, Inc., authority under Subpart I of Part 296 of the Board's Economic Regulations as a domestic air freight forwarder effective upon termination of the authorizations described in paragraph 3 above.[49]

49. We shall require that REA update its air freight forwarder application for administrative purposes. Issuance of operating authority shall be subject to the completion of the technical requirements, in accordance with the procedures set out in section 296.43 of the Board's Economic Regulations. Since the amendments are technical in nature, no filing fees will be required.

6. Certificated air carriers providing scheduled interstate and overseas air transportation are under an obligation to offer priority service under tariffs so providing as part of their duty to provide adequate interstate and overseas air transportation.

7. The Board should retain jurisdiction over this proceeding for the purpose of reviewing at any time the authorization granted herein and of imposing at any time, with or without hearing, such other conditions as the Board may find just and reasonable.

8. Except to the extent granted herein, all applications, requests, and motions involved herein should be denied, and this investigation should be terminated.

An appropriate order will be entered.

TIMM, Chairman, GILLILLAND, Vice Chairman, and MINETTI, Member, concurred in the above opinion. WEST and O'MELIA, Members, did not participate.

EXPRESS SERVICE INVESTIGATION
DATED DECEMBER 7, 1973

Order 73-12-36

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 7th day of December, 1973

Docket 22388

EXPRESS SERVICE INVESTIGATION

ORDER

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision;

IT IS ORDERD:

1. That approval of Agreement CAB Number 12866, initially approved by Order E-13764, dated April 21, 1959, as amended (the most recent amendment being approved by Order 72-12-109, dated December 22, 1972) be and it hereby is withdrawn effective upon the termination of the authorizations described in paragraph (3) below, and said agreement be and it hereby is disapproved on the same date.

2. That approval of Agreement CAB Number 17935, initially approved by Order E-22271, dated June 4, 1965, as amended (the most recent amendment being approved by Order 72-7-8, dated July 5, 1972) be and it hereby is withdrawn effective upon the termination of the authorizations described in paragraph (3) below, and said agreement be and it hereby is disapproved on the same date.

3. That the exemption authority of REA Express, Inc. to conduct operations in air transportation initially granted by Order Serial Number 941, dated March 13, 1941, as amended (the most recent amendment authority being granted by exemption Order E-22273, dated June 4, 1965) be and it hereby is terminated on the date that REA commences air freight forwarder operations pursuant to an authorization issued in accordance with our decision herein, or 180 days from the service date of this Order whichever date occurs first.

4. That an operating authorization to engage in air transportation as a domestic air freight forwarder in accordance with Part 296 of the Board's Economic Regulations shall be issued to REA Express, Inc. upon (a) completion of the technical requirements described herein, and (b) termination of the authorizations described in paragraph (3) above.

5. That the Board shall retain jurisdiction of this proceeding for the purpose of reviewing the operating authorization granted herein and/or imposing at any time, with or without hearing, such conditions as the Board may find just and reasonable.

Express Service Investigation Dated December 7, 1973

6. That, except to the extent granted herein, all motions, applications, and requests involved herein be and they hereby are denied.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

ORDER OF CAB DATED JULY 23, 1970 OF INVESTIGATION AND SUSPENSION

Order 70-7-109

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 23rd day of July, 1970

Docket 22387

Revisions in air express rates and
charges proposed by

RAILWAY EXPRESS AGENCY, INCORPORATED
AND PARTICIPATING AIR CARRIERS

ORDER OF INVESTIGATION AND SUSPENSION

By tariff revisions filed June 25 and marked to become effective July 27, 1970, Railway Express Agency, Incorporated (REA) and air carriers participating in the tariffs with REA propose to revise the structure of air express rates and charges in the United States and between the United States and Canada. The proposal involves increasing the minimum charge from $8.00 to $8.50 per shipment under both general and most specific commodity rates. It also involves significant revisions in general commodity rates, both increases and decreases. The

increases would typically affect the rates for relatively small shipments and short hauls while rates for larger shipments and longer hauls would be reduced.

Complaints requesting investigation and suspension were submitted by Muzak, a Division of Wrather Corporation (Muzak), and by the Air Freight Forwarders Association, representing nine member forwarders (AFFA). Muzak's complaint protests the increases in rates proposed and claims that, without REA's services at reasonable rates, Muzak would suffer serious and irreparable injury.

AFFA protests the rate reductions proposed, *inter alia*, on the grounds that the proposals would eliminate air freight forwarder participation in the "historic" forwarder markets, that the proposed rates would involve destructive competition since they would be below the apparent total cost of the service, that REA's returns would be below its own costs, and that the reduced rates would be maintained through the revenues gained from sharp rate increases proposed in the short-haul, small-shipment markets and through the airlines' subsidy of REA in these markets. The complaint also asserts that the proposal would place REA in the forwarding business without re-examination of the statutory and policy problems involved, such as REA's monopoly "priority" in airlift not available to independent forwarders.

In support of their filings and in answer to the complaints, REA and the participating airlines variously assert, among other

things, that (1) the proposed rates will reflect changes consistent with operating costs for both REA and the airlines, (2) the reduced rates for long-haul shipments will be responsive to the Board's expressed desires to have such rates more nearly reflect operating costs, (3) the revenues to REA will cover no more than costs plus a fair return, considering the sharp inflation that has occurred in labor and other costs, (4) the cost justification presented by REA actually understates its actual costs, (5) the airlines' revenues from express traffic have not kept pace with cost increases, (6) the airlines' express revenues per ton-mile reflect the value of priority service for express shipments and higher airline costs of rendering such service, (7) that the forwarders' complaint contains certain factual errors, and (8) the airlines' revenues from express must be evaluated in the light of the circuitous mileage actually flown and the interline handling required by many express shipments.

Upon consideration of all relevant factors, the Board finds that the proposals listed in Appendix A may be unjust, unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and should be investigated. Furthermore, to the extent that the tariff provisions would apply to shipments within the United States, the tariff provisions should be suspended pending investigation.

The proposed revisions involve both significant increases and decreases in costs to the public but we do not believe that they have been adequately justified. The minimum air express charge for both general and specific commodity rated air express

shipments would rise from $8.00 to $8.50 per shipment. It should be noted, however, that REA filed its $8.00 minimum charge effective May 28, 1970, representing an increase from $6.00 per shipment. Thus, the proposed minimum charge represents an increase of almost 42 percent above the charge in effect approximately two months ago. It should be noted, furthermore, that the $6.00 minimum charge has been in effect only since June 18, 1969, while the prior charge was $5.50, which in turn had been in effect less than three years. Previously, the charge was $4.70.

REA's proposed increases in general commodity rates involve increases for small shipments, especially in markets involving short hauls. For markets below 250 miles the increases would be as much as 85 percent over current levels. For the foregoing markets, the rates proposed will involve increases by as much as 138 percent above the rates quoted prior to May 28, 1970. For the longer hauls and larger shipments, reductions are proposed as high as 24 percent. The forwarders, in their complaints, claim that those reductions will threaten their existence.

In the current air express rate structure, rates are published for each pound of shipment weight for various lengths of haul up to 100 pounds, with larger shipments rated on the basis of the 100-pound rate. The proposal would involve lower rates per pound for larger shipments in 10-pound groups up to and including 300 pounds. The proposed revisions would make REA more competitive in the larger shipment market and raise certain

fundamental questions of great import to both forwarders and the general public.

We are of the opinion that the justifications presented by REA and the airlines are not adequate to support the proposed rate structure. REA, for example, includes a return element based upon an operating ratio of 90 percent. The use of an operating ratio to calculate the earnings element has not been accepted by the Board, which has generally considered that the appropriate method of computing earnings element is in terms of a return on investment capital. An investigation would be a proper vehicle to determine the appropriate rate of return on investment and other costs presented by REA, including the allowance made for inflation.

We shall also suspend, pending investigation, the increase proposed in the excess value rate from 18 cents to 30 cents per $100.00 of excess valuation. Excess valuation declarations apply to the value of the shipment above 50 cents per pound or $50.00 per shipment, which is the assumed liability of REA and the airlines for loss or damage and which is covered by the basic air express charges. Airlines typically charge 10 cents per $100.00 of excess valuation, while most forwarders charge 10 or 15 cents. The Board does not believe that the charges should exceed the costs of the additional coverage. No support has been advanced for this proposed increase and accordingly this proposal will be suspended pending investigation.

The tariff rates must be reasonably related to the total costs of the service, embracing those of the direct air carriers as well

as those of REA. In order to assure that the rates and charges cover the costs and a reasonable profit element to both the direct air carriers and to REA but not in excess thereof, it will be necessary that the investigation be directed to both the rates and charges proposed and the divisions of such rates and charges between the air carriers and REA.[1]

Accordingly, pursuant to provisions of the Federal Aviation Act of 1958,

IT IS ORDERED THAT:

1. An investigation is instituted to determine whether the rates, minimum charges, and provisions described in Appendix A attached hereto, and rules, regulations, and practices affecting such rates, minimum charges, and provisions, are or will be unjust, unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and if found to be unlawful, to determine and prescribe the lawful rates, minimum charges, and provisions, and rules, regulations, or practices affecting such rates, minimum charges, and provisions;

2. Pending hearing and decision by the Board, the rates, minimum charges, and provisions described in Appendix A attached hereto (except rates, minimum charges, and provisions applying to or from Canadian points) are suspended and their use deferred to and including October 24, 1970, unless otherwise

1. By Order 70-7-110, issued concurrently herewith, action on the Air Express Agreement C.A.B. 17935 A5 is deferred. This action of deferral, however, should not be construed as deferring action on the investigation of the rates and charges or of the divisions thereof.

ordered by the Board, and that no changes be made therein during the period of suspension except by order or special permission of the Board;

3. The scope of the investigation instituted by ordering paragraph 1 above shall include the issue as to whether the divisions of the rates and charges described in Appendix A are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the Railway Express Agency, Inc. and the air carriers and foreign air carriers parties thereto, and if so, to prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers.

4. The complaints of the Air Freight Forwarders Association, in Docket 22352, and Muzak, a Division of Wrather Corporation, in Docket 22347, are hereby dismissed except to the extent granted herein;

5. The proceeding herein be assigned for hearing before an examiner of the Board at a time and place hereafter to be designated; and

6. A copy of this order shall be filed with the tariffs and served upon the carriers listed in Appendix B, which are hereby made parties to this proceeding.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

HARRY J. ZINK

Secretary

(SEAL)

APPENDIX A

TARIFF C.A.B. NO. 1 ISSUED BY G. T. MIANO, AGENT:

The charges and provisions in RULE NO. 8(A) on 7th Revised Page 7.

The charges and provisions in RULE NO. 8(B) on 7th Revised Page 8.

The charges and provisions in RULE NO. 20 on 17th Revised Page 16.

All rates, charges, and provisions on the following pages (except those bearing the reference mark which denotes no change or those which are made subject to provisions which specifically state that no change has been made therein):

15th Revised Page 122
Original Page 122-A
Original Page 122-B
12th Revised Page 123
12th Revised Page 124
Original Page 124-A
Original Page 124-B
13th Revised Page 125
13th Revised Page 126
12th Revised Page 128
11th Revised Page 129
8th Revised Page 129-A
6th Revised Page 129-B
Original Page 129-C
Original Page 129-D
8th Revised Page 141-A
7th Revised Page 141-B
10th Revised Page 142
7th Revised Page 143-A
6th Revised Page 143-C
7th Revised Page 143-E
5th Revised Page 143-G

The minimum charges per shipment and the provisions applicable thereto on the following pages:

19th Revised Page 145
11th Revised Page 150
8th Revised Page 151
7th Revised Page 152
10th Revised Page 153

On 20th Revised Page 145, 12th Revised Page 150 and 9th Revised Page 151:

(a) The minimum charges per shipment subject to the encircled reference mark 2, and the provisions applicable thereto; and

(b) The reference mark "#" and the provisions in the explanation thereof.

The provisions on the tariff pages specified above in this appendix and on the following tariff page insofar as such provisions cancel rates which are proposed to be superseded by the suspended rates and insofar as such provisions cancel suspended rates or provisions:

12th Revised Page 127

Order of CAB Dated July 23, 1970 of Investigation and Suspension

APPENDIX B

Air Canada
Airlift International, Inc.
Air West, Inc.
Alaska Airlines, Inc.
Allegheny Airlines, Inc.
American Airlines, Inc.
Aspen Airways, Inc.
Braniff Airways, Inc.
Caribbean-Atlantic Airlines, Inc.
Compagnie Nationale Air France
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Frontier Airlines, Inc.
Los Angeles Airways, Inc.
Mohawk Airlines, Inc.
National Airlines, Inc.
New York Airways, Inc.
North Central Airlines, Inc.
Northeast Airlines, Inc.
Northwest Airlines, Inc.
(Also operating as Northwest Orient Air Lines)
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Piedmont Aviation, Inc.
Railway Express Agency, Incorporated
San Francisco & Oakland Helicopter Airlines, Inc.
Seaboard World Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
The Flying Tiger Line Inc.
Trans Caribbean Airways, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Air Lines, Inc.

Air Express service provided hereunder is performed by the participating carriers pursuant to an Agreement which has been filed with and approved by the Civil Aeronautics Board.

Source: 14th revised page 4 of Agent G. T. Miano's C.A.B. No. 1.

Effective December 5, 1969

No. 75-1233

Supreme Court, U. S.
FILED
MAY 13 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

REA EXPRESS, INC., A BANKRUPT, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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Schaffer Transportation Co. v. *United States*, 355 U.S. 83 10

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1233

REA EXPRESS, INC., A BANKRUPT, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-22a) is reported at 524 F.2d 54.[1] The opinions and orders of the Civil Aeronautics Board (Pet. App. 23a-140a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1975. A petition for rehearing with suggestion for rehearing *en banc* was denied on December 1, 1975. The petition for a writ of certiorari was filed on February 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]References are to the separate Appendix filed with the petition.

QUESTION PRESENTED

Whether the court of appeals correctly found that the Civil Aeronautics Board's decision to terminate the temporary authority granted exclusively to REA Express, Inc., to engage in a form of air-cargo service known as "air express," and to disapprove agreements between REA and United States airlines under which this service was provided, is supported by substantial evidence.

STATUTE INVOLVED

The relevant sections of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are set forth in the Appendix, *infra*, pp. 1a-3a.

STATEMENT

A. Background

"Air express" is a term used to describe a priority air-cargo service. The service was offered on a door-to-door basis, and included all ground services required to make the shipment and delivery to the consignee. The exclusive provider of air express service was REA Express, Inc., which offered the service pursuant to agreements with the various United States air carriers (Pet. App. 11a, 96a).

In 1941, the Civil Aeronautics Board found that by providing this service, which is the oldest method of shipping air cargo, REA was acting as an indirect air carrier. The Board, pursuant to Section 1(2) of the Civil Aeronautics Act of 1938,[2] granted REA a temporary exemption to continue providing this service. In 1943, the Board approved, with certain modifications, the

[2] *Railway Express Agency, Grandfather Certificate*, 2 C.A.B. 531. Section 1(2) of the Civil Aeronautics Act of 1938, 52 Stat. 977, is now contained in Section 101(3) of the Federal Aviation Act of 1958.

agreements between REA and the air carriers, and continued REA's temporary exemption.[3] Since 1943, the airlines and REA have renewed their agreements at five-year intervals, and have obtained the Board's approval for these agreements pursuant to the Board's authority to approve or disapprove contracts entered into by carriers. See Section 412(b) of the Federal Aviation Act of 1958, 49 U.S.C. 1382(b). REA's temporary exemption also has been periodically extended (Pet. App. 10a, n. 1). In this fashion, air express was established as a unique service and REA was granted the exclusive right to provide it. The Board, however, explicitly made extension of REA's temporary exemption "subject to revocation by the Board at any time if it deems that the exemption * * * granted is no longer in the public interest." *Air Freight Forwarder Case*, 9 C.A.B. 473, 479.

Air express service was formerly the only method by which cargo could be shipped by air carrier. In 1943, however, the Board, as part of its policy of developing and improving air cargo service, approved airport-to-airport "air freight" services by air carriers. The Board also approved "air freight forwarder" service in 1948 (Pet. App. 12a).[4] These new services affected the market in such a way that air express service "eventually develop[ed] primarily into a door-to-door small package service, with the average shipment weighing only 27 pounds and moving approximately 500 miles" (Pet. App. 12a; see Pet. App. 113a-114a).

[3] *Railway Express Agreements*, 4 C.A.B. 157.

[4] Air freight forwarders are "authorized to pick up freight from shippers at a given point, assemble and consolidate the shipments for transfer by direct air carrier and, upon arrival of the consolidated shipment at its designation, perform break-bulk and distribution functions" (Pet. App. 12a).

On June 30, 1969, the "air express" agreement between REA and the airlines expired, but the agreement was extended on an interim basis during the course of prolonged negotiations.[5] In June 1970, REA and the airlines submitted for Board approval amendments to the agreement together with new tariffs containing substantial rate increases. However, REA also asked the Board to restructure the air express arrangement by making the agreement permanent, by giving REA independent authority to set rates free of veto by the air carriers, and by authorizing REA to act both as the exclusive provider of air express services and as an air freight forwarder. The air carriers opposed these proposals.

The Board, finding insufficient justification for the proposed rate increases, suspended the tariffs and instituted an investigation to determine whether continued authorization of REA's exclusive air express service and approval of the new agreement would be in the public interest (Pet. App. 136a).[6] *Express Service Investigation* (Docket 22388). It also commenced a separate investigation of air express rates and the division of revenues between REA and the air carriers. *Express Rate Investigation* (Docket 22387).

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[5]There were disputes concerning such matters as REA's escalating costs, its deteriorating financial position, and the proper division of revenues between REA and the airlines.

[6]Once the Board had suspended the new tariffs, the revised agreement collapsed and REA refused to extend the existing agreement any further. Several shipper groups thereupon obtained a preliminary injunction preventing REA and the airlines from terminating air express services. *Allied American Bird Co. v. REA Express, Inc.*, D. D.C., Civ. No. 2289-70, decided August 12, 1970. Shortly thereafter, the parties stipulated to an interim extension of the existing agreement (Agreement C.A.B. 17935) until 60 days after the date of final orders in the Board's proceedings (including judicial review), and on the basis of that agreement, obtained a dismissal of the preliminary injunction.

B. Findings and Conclusions of the Board

After considering extensive evidence presented in the *Express Service Investigation*, the Board concluded that neither a continuation of the existing arrangement nor the restructuring proposed by REA would be in the public interest (Pet. App. 100a-123a).

REA acknowledged that it was experiencing acute financial difficulty, due primarily to the substantial decrease in traffic volume over the previous several years (Pet. App. 98a-100a, 112a-113a).[7] In light of this, the Board found that "the basic realities of the situation offer no practicable way of retaining the present air express arrangement" (Pet. App. 111a; see *id.* at 91a, 95a, 110-113a).

After examining REA's proposals to restructure the air express arrangement, the Board concluded that these "would raise a host of problems * * *" (Pet. App. 113a; see *id.* at 113a-119a). As to the proposal to grant REA dual authority to provide air express service and act as a freight forwarder, the Board found that such authority would be contrary to the public interest because it would have deleterious effects on the market (Pet. App. 118a):

> If this helped REA to dominate the entire indirect carrier industry, as it might, it would inevitably lessen competition among existing forwarders and,

---

[7]REA's surface traffic declined from 47 million shipments in 1967 to 15 million shipments only three years later (Pet. App. 99a). Air express traffic had shown only a 3 percent increase from 1966 to 1970, in comparison with a 168 percent increase during the same period for air freight forwarding shipments (Pet. App. 99a). REA's last profitable year was 1965 when it earned about $1,000,000. It lost about $76 million from 1966 through 1973. The first quarter of 1974 reflected the same pattern. Air express shipments in April 1974 declined 15 percent. REA continued to survive only by selling off capital assets amounting to more than $48,000,000 (Pet. App. 100a).

> perhaps, sap the vitality of that group. Of course, that would thwart this agency's primary goal in licensing REA and the forwarders — namely, to promote the vigorous development of air freight.

As to REA's request for independent rate authority, the Board found that such authority would "virtually assure bitter and continuing disputes between * * * REA and the airlines," create "grave regulatory problems," adversely affect small package shippers now largely dependent on REA, and impair the operations of air freight forwarders (Pet. App. 115a-117a).

In any event, the Board found that approving REA's proposal would be "futile," because the airlines had "served notice that they would not become parties to any express agreement" with REA (Pet. App. 119a), if REA were given either dual authority or independent ratemaking authority (see also Pet. App. 92a, 114a-115a). Since the existence of air express service depends on the maintenance of an agreement between REA and the airlines—two parties whose divergent interests had become an almost insuperable source of friction (see Pet. App. 111a)—the Board concluded that REA's proposals, in addition to raising "a host of problems, * * * simply would not work" (Pet. App. 113a).

The Board recognized nevertheless that expanding REA's authority might be justified if the continued existence of air express service was "so vital that it outweighs all other considerations" (Pet. App. 93a). But the Board found this not to be the case because, with the development of air freight and air freight forwarder services, the unique advantages once provided by REA's service had "withered away" (Pet. App. 93a). Based on an extensive comparison of the competing services, the Board found that while REA's services remained attractive for small shipments moving relatively short distances

(Pet. App. 97a), air express fulfilled no unique service needs in terms of the speed of delivery (Pet. App. 100a-105a), or of geographic or commodity coverage (Pet. App. 105a-110a).[8]

Accordingly, the Board found that "cessation of air express service [would] have no material impact on the public" (Pet. App. 110a). Indeed, because REA's exclusive authority to provide air express service represented "an anomaly in an air transport system enjoined to preserve '[c]ompetition to the extent necessary * * *' (49 U.S.C. 1302)" (Pet. App. 119a-120a), the Board recognized certain affirmative advantages for the industry in terminating that authority and in thereby opening the small market which had utilized air express to free competitive forces (Pet. App. 91a, 95a, 120a).[9]

The Board therefore terminated its approval of the air express agreements between REA and the airlines, and withdrew REA's temporary exemption authority (Pet. App. 128a-130a). However, the Board authorized REA to engage in air transportation as a domestic air freight forwarder (see Pet. App. 129a), both because the Board believed that REA's prospects would be greatly enhanced

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[8] The priority treatment accorded to air express shipments was found to have limited impact because only 1.7 percent of all flights surveyed departed without sufficient space to accommodate the tendered cargo (Pet. App. 102a-104a). Although REA has traditionally served more cities than its air freight competitors, the Board found that its current financial condition would result in a consolidation of services and thus a loss of REA's broad geographic coverage (Pet. App. 105a-107a). The forwarders and air carriers provide coextensive commodity coverage with the exception of 18 items. The Board observed that REA could continue to transport those 18 items as a freight forwarder and that the carriers have begun to transport those items (Pet. App. 108a-110a).

[9] The Board recognized that certain limited types of cargo require highly expedited delivery and ordered the air carriers to publish high-priority tariffs for such cargoes (Pet. App. 104a-105a, 123a-125a).

as a provider of such services, and because granting REA such authority would serve the public interest (Pet. App. 95a, 121a-123a).[10]

REA sought reconsideration of the Board's order. The petition was denied (Pet. App. 65a-86a), except to the extent that REA's authority to provide air express services was extended until no later than August 1, 1974 (Pet. App. 86a).

C. Review in the Court of Appeals

REA then filed a petition for review in the United States Court of Appeals for the Second Circuit. On July 16, 1974, the court stayed the Board's orders pending its review (Pet. App. 10a).

While the review proceedings were pending, REA and some of the air carriers reached a new air express agreement and filed it with the Board. The court of appeals remanded the proceeding to the Board (while retaining jurisdiction) to enable it to reexamine its decision in light of the new agreement. On remand, the Board disapproved the new agreement (Pet. App. 31a-45a), finding that it perpetuated an arrangement that no longer afforded the public any unique service and that it gave REA a monopoly advantage that thwarted development of modern and superior priority air freight service. The Board also found that developments in the interim had buttressed its original decision. The withdrawal of several air carriers from the arrangement, for example, ended REA's nationwide coverage. Moreover, REA had since filed a

[10] The Board issued a contemporaneous decision in the *Air Express Rate Investigation* case (Pet. App. 51a-64a). After noting "major gaps" (Pet. App. 53a) in the financial data submitted to it, the Board decided that some issues were moot in light of the *Service Investigation* decision and that other issues required further administrative proceedings.

bankruptcy petition, which, the Board concluded, made "the new air express agreement * * * no more stable than the earlier arrangement was at the time of our original decision" (Pet. App. 37a). The Board denied REA's petition for reconsideration (Pet. App. 23a-30a).

The court of appeals affirmed the Board's decision (Pet. App. 7a-22a), holding that the Board's findings were supported by substantial evidence and that its conclusions were reasonable. The court ruled that the Board had (Pet. App. 18a)

> observed its responsibilities to REA and to the public, making its "public interest" determinations only after weighing and balancing the essential relevant factors which it was obligated to consider: the shippers' needs, the cargo offered for transport, the nature and extent of the markets and commodities affected, and the characteristics of the three competing services.

D. Subsequent Developments

After the court of appeals' decision, REA was adjudicated a bankrupt by order of the United States District Court for the Southern District of New York, entered November 6, 1975 (see Pet. 8). The trustee was directed to liquidate assets of the company, and he has begun to do so. By the express terms of the agreement under which REA and the airlines had been operating pending the conclusion of this litigation (see note 6, *supra*), the agreement was "terminate[d] forthwith" by REA's bankruptcy.

ARGUMENT

In view of the bankruptcy adjudication and liquidation, this case presents no issues of continuing importance warranting review by this Court. In any event, the court

of appeals correctly concluded that the Board considered all of the relevant factors and that the Board's determinations were supported by substantial evidence. 49 U.S.C. 1486(e); see *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

1. Petitioner contends (Pet. 11-15) that the Board did not adequately consider the economic impact of terminating REA's temporary exemption authority. But the Board's decision was based upon extensive consideration of the probable effect, both economic and otherwise, of various alternatives upon REA, freight forwarders, and shippers. The Board ultimately concluded that the alternative it selected would likely lead to the most efficient and economical air freight services.[11] The Board knew that REA's air express service was less expensive for some classes of shippers (*e.g.*, small package, short haul) than were other forms of service (Pet. App. 94a, 97a, 110a). But the Board also knew that this was at best a short-term benefit from an operation that already was on "the brink of extinction" (Pet. App. 91a; see *id.* at 75a, 36a-

[11]Petitioner relies upon *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (cited at Pet. 13), in which the Interstate Commerce Commission refused to authorize a competing motor carrier service on the ground that the present rail service was adequate, without the Commission having given sufficient consideration to the inherent advantages of motor carrier service. Here, in contrast, the Board refused to continue the exceptional authorization of a form of antiquated service that now thwarts the development of air freight forwarder and other alternative services. In any event, as noted by the court below (Pet. App. 19a-20a), the Board did examine the cost of air express service in determining that the continuation of such service was no longer in the public interest.

37a).[12] This benefit, the Board concluded, was outweighed by the benefits to the public from abandonment of the deteriorating service (see, *e.g.*, Pet. App. 74a-75a, 94a-95a, 111a).

Petitioner also contends (Pet. 15) that the Board's decision to order the air carriers to develop new forms of priority cargo service (see note 9, *supra*) deprived REA of a comparative hearing under *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327. At the extensive hearing conducted in this case, the Board fully examined REA's request for continued and expanded authority to conduct air express service, and compared that request with currently available alternative services. Moreover, as the court of appeals pointed out (Pet. App. 21a), "the high-priority service contemplated by the Board is not intended as a replacement of air express service but as an entirely new type of fast, airport-to-airport service not presently available * * *." Therefore, this is not an instance in which an agency has authorized a service without first affording a hearing to the competing applicant.

2. Petitioner further contends (Pet. 15-20) that in terminating REA's express service, the Board failed to comply with the National Environmental Policy Act. This contention apparently is based on petitioner's belief that its air express operations were more efficient than

[12]The Board did not abuse its discretion in refusing to defer termination of express service until it could evaluate the effect of a final decision in the *Rates* case upon the cost of REA's express service. The relevant economic factors were fully explored in the *Service* case, and, in any event, the economic factor was merely one of several reasons for the Board's decision.

other forms of air freight.[13] As petitioner concedes (Pet. 18), this claim was not presented to the Board in a timely manner. Moreover, REA mentioned the point only in passing (in a footnote) in its brief to the court of appeals. There is no reason for this Court to consider the claim.

3. Contrary to petitioner's contention (Pet. 20-28), the Board was not insensitive to REA's financial difficulties. In determining, after carefully analyzing the evidence presented, that REA's monopoly position was no longer in the public interest, the Board acted within its statutory authority. From the outset of these proceedings, the Board recognized that REA was on the brink of collapse. The Board accepted REA's representation that the air express arrangement in existence at the time was not financially feasible (Pet. App. 91a). It also recognized that continued air express service was no longer practical in view of the deterioration in relations between REA and the air carriers (Pet. App. 110a-113a). In light of this understanding, the Board's decisions were based not only on the belief that REA's exemption was contrary to the public interest, but also on the determination that REA's operation as an air freight forwarder assured it the best chance for economic survival (Pet. App. 76a-85a, 95a, 123a).[14]

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[13]The Board's finding that substantial efficiencies would be achieved by utilizing other forms of air freight service undermines petitioner's assertions.

[14]Petitioner suggests (Pet. 25-28) that due process required additional hearings by the Board. Prior to making its initial decision, the Board conducted extensive hearings as a part of a massive investigation into the continuing viability of REA's air express service. Due process requires nothing more. The Board, moreover, correctly viewed the court of appeals' remand (to consider the effect on the Board's decision of the new proposed agreement between REA and the airlines) as not requiring additional hearings (Pet. App. 27a-28a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1976.

DOJ-1976-05

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*:

TITLE I — GENERAL PROVISIONS

DEFINITIONS

Sec. 101. [49 U.S.C. 1301.] As used in this Act, unless the context otherwise requires—

* * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

* * * * *

TITLE IV — AIR CARRIER ECONOMIC REGULATION

* * * * *

POOLING AND OTHER AGREEMENTS

FILING OF AGREEMENTS REQUIRED

Sec. 412. [49 U.S.C. 1382.] (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalities, bonds, or otherwise) affecting air transportation and in force on the effective data of this section or hearafter entered into, or any modification

or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

APPROVAL BY BOARD

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

* * * * *

TITLE X — PROCEDURE

* * * * *

JUDICIAL REVIEW OF ORDERS

* * * * *

Sec. 1006. [49 U.S.C. 1486.]

FINDINGS OF FACT CONCLUSIVE

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so, urged, unless there were reasonable grounds for failure to do so.

In The

Supreme Court of the United States

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October Term, 1975

No. 75-1233

REA EXPRESS, INC., a Bankrupt,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

AIRLINES PARTICIPATING in AIR EXPRESS SERVICE, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN RETAIL FEDERATION, BROTHERHOOD of RAILWAY and AIRLINE CLERKS, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, DRUG and TOILET PREPARATION TRAFFIC CONFERENCE, and EASTERN INDUSTRIAL TRAFFIC LEAGUE, PET INDUSTRY PARTIES, EMERY AIR FREIGHT,

Intervenors.

REPLY ON BEHALF OF PETITIONER

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Respondent,

Airlines Participating in Air Express Service, Air Freight Forwarders Association, American Retail Federation, Brotherhood of Railway and Airline Clerks, National Small Shipments Traffic Conference, Drug and Toilet Preparation Traffic Conference, and Eastern Industrial Traffic League, Pet Industry Parties, Emery Air Freight,

Intervenors.

REPLY ON BEHALF OF PETITIONER

I.

This reply is submitted in response to the Brief in Opposition filed herein on behalf of the Civil Aeronautics Board. If the determination of whether to grant certiorari is to stand or fall on the accuracy of the Board's assertions (1) that it "did examine the cost of air express service in determining that the continuation of such service was no longer in the public interest" (fn. 11) and (2) that "the relevant economic factors were fully explored in the *Service* case" (fn. 12), then certiorari should be granted, for such assertions are flatly in error.

From the very beginning, REA has contended that the economic issues in the *Rates* case should not be bifurcated from the issues in the *Service* case. Having persisted in its wrongheaded approach over REA's continuing objection, the Board now seeks to evade responsibility for the error by misrepresenting to this Court the facts relative to its existence.

Instead of determining the economic issues, the Board consigned them to an administrative broom closet. Rather than fully exploring the relevant economic factors, the Board expressly declined to determine them, using the "no useful purpose" rubric as an excuse (52a). Indeed, the Board admitted the inadequacy of the record (56a-57a).

The Board said it need not determine the economic issues in view of its separate decision in the *Service* case (52a); we say the issues are inextricably intermingled and that the *Service* case may not be validly decided without a decision of the economic issues raised in the separate docket constituting the *Rates* case.

The procedural prejudice was extensive. Since a decision in the *Rates* case was never reached by the Board, its due process significance must be evaluated on the basis of REA's claims. On that basis, had the case been decided, (1) REA, with a claim of approximately $50 million against the airlines, might not now be in bankruptcy, (2) the rates paid by shippers could have been significantly reduced, (3) the number of Air Express shipments handled substantially increased, (4) 10,000 career express employees not thrown out of work, and (5) a different result reached in the *Air Express Service* case.

Thus the Board's own finding that the record was inadequate for the purpose of a decision on the economic issues would require, under *Universal Camera Corporation v. NLRB,* 340 U.S. 174, that the case below be remanded to the Board for findings if the undecided economic issues are essential for a proper determination. We submit that they are essential under prior rulings of this Court, and that certiorari should be granted to review the question.

II.

REA is in bankruptcy. Its trustee, C. Orvis Sowerwine, Esq., is presently operating a part of the surface business, and is entertaining proposals for full-scale restoration of the express services. The proposals received were filed with the Bankruptcy Court on May 24, 1976. The Bankruptcy Court has ordered them to be set down for hearings.

One such proposal contemplates the possibility of restoring Air Express operations. Some modifications in the arrangement may be required to implement new operational plans, in which

event they would be submitted to the Board for consideration. But this possibility should not be foreclosed by some *res judicata* problem which might be created by the decision below. In view of these changed circumstances, we suggest that the writ might appropriately be granted by summary action, the judgment below vacated, and the cause remanded. See Stern & Gressman, *Supreme Court Practice*, §5.13.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

s/ Arthur M. Wisehart

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